IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF.

KENNETH J. MULLANE,
Counsel for Appellant,
350 Fifth Avenue,
New York 1, New York.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., *et al.*

APPELLANT'S BRIEF.

Statement.

This is a review on orders of Mr. Justice Frankfurter (R. 239) and of this Court (R. 241) respectively, of a final judgment of the New York Court of Appeals (R. 243-4, 224-5), which affirmed two orders of the Appellate Division, First Department (R. 129-130, 212-213). Said orders of the Appellate Division affirmed an interlocutory decree and a final decree respectively, of the Surrogate's Court, New York County, in this proceeding brought pursuant to Section 100-c of the Banking Law of the State of New York for the judicial settlement of the first account

Note: All italics are supplied by appellant unless otherwise noted.

of a trustee of a Discretionary Common Trust Fund established pursuant to said statute (R. 4-14, 175-190).

Both the said interlocutory and final decrees overruled appellant's objection that the provisions of said Section 100-c for notice of hearing of the judicial settlement of such an account are insufficient to confer jurisdiction upon the New York courts over persons interested in the income of a common trust fund, and are inadequate to meet the requirements of due process of law under the Federal Constitution (R. 34-35, 150, 156). The basis of the objection is that *the act requires service on persons whose names and addresses are on the books of the Trust Company by a local publication only, without mailing, of a process in which such known persons are not named.*

Opinions Below.

No opinion was rendered in any of the New York courts except the opinion of the Surrogate (R. 105-120) and the dissenting opinion of Justice Van Voorhis in the Appellate Division (R. 163-168), which are reported in 75 N. Y. Supp. 2d 397 (not officially reported), and in 274 N. Y. App. Div. 772, respectively.

Jurisdiction.

A petition for allowance of an appeal was presented to Mr. Justice Frankfurter (R. 234-237) who made an order, dated August 27, 1949, allowing the appeal (R. 239) and an order of this Court dated November 7, 1949, was made postponing further consideration of the question of the jurisdiction of this Court to the hearing of the case on the merits (R. 241).

The jurisdiction of this Court rests on Title 28, United States Code, Section 1257; Act of June 25, 1948, Chapter 646, Section 39; 62 Stat. 992, and the due process clause of the Fourteenth Amendment to the Federal Constitution reading:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law" (Constitution of U. S. A., XIV Amendment, sec. 1).

The problem of such jurisdiction is treated under Point Third herein (this brief, pp. 87-89).

Summary Statement of Case.

Prior Proceedings.

Appellee, Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1, established and operated pursuant to Section 100-c of the Banking Law of the State of New York (Ch. 687, L. 1937, as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944),[1] on March 28, 1947, filed in the Surrogate's Court, County and State of New York, its first account of proceedings, as Trustee as aforesaid, together with its petition for the judicial settlement of said account and for further relief (R. 4).

The total number of trusts participating in the said Common Trust Fund during the period covered by the account, is 113 of which fifty-six are *inter vivos* trusts (R. 106). The total of the gross capital fund is $2,926,437.25 (R. 186).

---

[1] The relevant portions of said Section 100-c are printed in Appendix A of this brief (pp. 91-102) except subdivision 2 which is quoted in full at pp. 7-8.

Pursuant to subdivision 12 of said Section 100-c (Appx. A, pp. 98-99) a "*citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds* mentioned in the petition, ..." was served by publication thereof once a week for four successive weeks in the New York Law Journal (R. 24-33, 175). No other or supplemental service was made, none being required by the statute.

Pursuant to said Section 100-c, the appellant herein was duly appointed by order of said Court special guardian and attorney in said proceeding for all persons, known and unknown who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the income of said Common Trust Fund (R. 12). Since there was no appearance, other than that of appellant, on behalf of anyone interested in income, appellant represents all persons interested in income (R. 1-3).

Pursuant to said Section 100-c, appellee James N. Vaughan, Esq. was duly appointed by order of said Court special guardian and attorney in said proceeding for all persons, known and unknown, who had not otherwise appeared in said proceeding, who had or might thereafter have any interest in the principal of said Common Trust Fund (R. 12). There was no other appearance on behalf of any person interested in principal (R. 1-3).

In said proceeding, appellant, as special guardian and attorney for persons interested in income, appeared specially and served his preliminary report and answer objecting to the jurisdiction of said Court upon the ground, among others (R. 34-35):

"That the provisions contained in Section 100-c

> of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

Said Court by its intermediate decree, dated November 26, 1947, overruled said objection of appellant and held, among other things, that (R. 14):

> ". . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

Appellant appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 3), and said Appellate Division, by order dated June 21, 1948, affirmed said decree (one justice dissenting) (R. 129-130).

Thereafter, appellant filed his report as such special guardian and attorney (R. 190-198) (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection on any such appeal (R. 190)) and reasserted verbatim his objection quoted above and said objection was overruled again by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above (R. 188).

Appellant then appealed to said Appellate Division

from said final decree (R. 211-2), which decree was affirmed (one justice dissenting) by order of said Appellate Division dated April 28, 1949 (R. 212-213).

Appellant then appealed to the New York Court of Appeals from said order of the Appellate Division dated June 21, 1948, affirming said intermediate decree (R. 217-218). Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following (R. 219-220):

> "Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of 'due process of law' under the Federal . . . Constitution with respect to said persons?"

Appellant also appealed to said Court of Appeals from said order of said Appellate Division dated April 28, 1949, affirming said final decree (R. 211-212). Said two appeals to the Court of Appeals were heard together. By final judgment of said Court of Appeals dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative, 299 N. Y. 697-698 (R. 224-225, 243-244).

Said Court of Appeals is the highest court of the State of New York in which a decision in said proceeding could be had.

In said proceeding, there is drawn in question the validity of a statute of the State of New York

(namely, subdivision 12 of Section 100-c of the Banking Law, Appx. A, pp. 98-9) on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of the validity of said statute.

Application was made by appellant on August 24, 1949 to Honorable John T. Loughran, the Chief Judge of the Court of Appeals of the State of New York, for an order allowing the said appeal, and said application was denied on August 24, 1949 by said Chief Judge of the said Court (R. 237).

Legislation Authorizing Common Trust Funds.

The establishment of common trust funds in New York was first authorized by the enactment of Chapter 687 of the Laws of 1937 (approved July 15th, 1937) which is now Section 100-c of the Banking Law (Appx. A, pp. 91-102). This statute empowers only trust companies for "the purpose of investment and reinvestment of money received and held by any trust company as executor, administrator, guardian, personal or testamentary trustee, or committee" to "establish and maintain one or more common trust funds" and "in any case where the instrument . . . under which such moneys are held does not forbid . . . invest and reinvest such money . . . by adding the same to any such common trust fund or funds and by apportioning shares or interests therein to itself . . . in such fiduciary capacity . . . *whether such fiduciary capacity arose or was created before or after this act takes effect*" (subd. 1, Appx. A, p. 91; R. 80-81).

Subdivision 2 of the Act reads in full: "2. Each common trust fund shall, subject to law, be *under the exclusive management and control of such trust com-*

pany and each share or interest therein shall participate ratably in such fund. No fiduciary of any estate, trust or fund having any such share or interest in a common trust fund *nor any person having an interest in any such estate, trust or fund shall have or be deemed to have any ownership in any particular asset or investment of such common trust fund. The ownership of such individual assets and investments of the common trust fund shall be in the trust company as trustee of such trust fund.*"

Section 100-c Imposes Conflicting Loyalties Upon the Trust Company.

It is apparent, as was stated by the special guardian for principal in his brief (p. 4) to the Appellate Division, herein, that a trust company as trustee of a common trust fund "*by definition is necessarily subject to a double loyalty.* In one point of view it must act solely for the sake of each particular estate, trust or fund which it administers. At the same time, as trustee of the common fund, it must act solely with a view to the proper administration of that fund."

Since subdivision 1 (Appx. A, p. 91) limits the investment and reinvestment in the common trust fund to "money received and held by any trust company as executor, administrator, guardian, person or testamentary trustee, or committee", it is obvious that the trustee of the common trust fund must be at least one of the fiduciaries of each of the participant trusts, estates or funds (R. 81).

The Persons Interested in Income Are Powerless to Prevent the Investment in the Common Trust Fund.

Because subdivision 1 (Appx. A, p. 91) specifically authorizes an investment in a common trust fund "where the instrument or the order, decree or judgment under which such moneys are held *does not forbid*", and "*whether such fiduciary capacity arose or was created before or after this Act takes effect*", a person interested in the income of an estate, trust or fund created, for example, in 1917 (R. 12), *is powerless to prevent an investment by the estate, trust or fund even in a discretionary common trust fund,* provided "the instrument or order of court under which such estate, trust or fund is held shall authorize the investment of moneys of said estate, trust or fund in any of the following: (a) in a discretionary common trust fund; (b) in such investments as the fiduciary thereof may select in the discretion of such fiduciary; (c) generally in investments other than those in which trustees are by law authorized to invest trust funds" (subd. 3, Appx. A, pp. 92-3).

Since there is no right given to persons interested in income, by Section 100-c or by any other statute, to require a trustee of a common trust fund to account, and because it has been held that the question, as to whether or not an investment by a participant estate, trust or fund in a common trust fund has been authorized, cannot be raised in the accounting proceeding for a common trust fund, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 469, it is clear that, even where *an improper participation in a common trust fund* has been made, the only recourse open to a person interested in income who learned of it would be to bring

a proceeding to compel the trust company as a *fiduciary of the individual estate, trust or fund* to account for its proceedings as such a fiduciary of said individual estate, trust or fund. Justice Van Voorhis emphasizes this when he points out in his dissenting opinion (R. 164, fol. 250) that ". . . the beneficiary would be powerless to alter or to prevent . . . the making of the initial investment in the common fund, . . ."

At the Inception of This Proceeding Only Discretionary Common Trust Funds Had Been Established in New York.

As originally enacted, Chapter 687 of the Laws of 1937 authorized the establishment of legal common trust funds only, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 461. As now in effect, Section 100-c authorizes the establishment of both legal common trust funds and discretionary common trust funds (subd. 3, Appx. A, pp. 92-3). In a legal common trust fund the funds can be invested in only those securities which are on the legal list (subd. 3, Appx. A, pp. 92-3). In a discretionary common trust fund "A trust company maintaining a discretionary common trust fund may invest the same in such investments as it may select in its discretion (subd. 3, Appx. A, pp. 92-3; R. 84-85).

It was not until the amendment of Section 100-c by Chapter 602 of the Laws of 1943 to permit the creation of discretionary common trust funds, that common trust funds were established in New York, and at the start of this proceeding all the existing ones were of the discretionary type, *Matter of Bank of New York*, 189 N. Y. Misc. 459, 462; *Matter of Security Trust Co. of Rochester*, 189 N. Y. Misc. 748, 751.

Discretionary Common Trust Funds May Readily Become the Chief Vehicle for the Investment of Small Estates, Trusts or Funds.

In the beginning, the Act limited participation in the common fund by any one estate, trust or fund to the maximum of $25,000.00. This has now been changed so that the maximum permissible investment is $50,000.00 (subd. 1, Appx. A, p. 91; *Matter of Bank of New York*, 189 N. Y. Misc. 459, 467; R. 63, 81-82). As shown later in this brief (pp. 68-9), 73.5 per centum of all trusts in the care of trust institutions have an annual income of $788.00, which would indicate an average principal of the value of approximately $27,000.00. Therefore, it is obvious that discretionary common trust funds "may easily become a major portion of trust business", as Justice Van Voorhis has found (R. 167, fol. 254).

The Notice of Hearing.

Section 100-c requires an account of the common fund to be filed not less than twelve nor more than fifteen months after the date of its establishment and triennially thereafter (subd. 10, Appx. A, p. 97). The only provisions of Section 100-c regulating the notice of application for judicial settlement of the account of a common trust fund are found in subdivision 12 thereof (Appx. A, pp. 98-9). *This subdivision requires a notice of hearing in which persons currently interested in income are not named and directs service thereof by a local publication upon both nonresidents and residents alike without any supplemental mode of service, such as mailing, even though*

the names and addresses of all such persons are on the books of the trustee of the common fund (this brief, pp. 39, 43-4).

The Effect of the Judicial Decree.

As demonstrated later in this brief (pp. 18-33), the decree settling a common trust fund account destroys important rights *in personam* of the persons interested in income which rights constitute property, which in many instances, vested in said persons long before the enactment of said Section 100-c.

Specification of Errors to Be Urged.

The New York Court of Appeals erred in holding:

1. That subdivision 12 of Section 100-c of the Banking Law is not repugnant to the Constitution of the United States of America and does not deprive of property without due process of law any of the persons interested in the income of a Common Trust Fund and in the income of any estate, trust or fund part or all of which is invested in such Common Trust Fund.

2. That due service of a notice in compliance with said subdivision 12 is sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income of a Common Trust Fund and in the income of an estate, trust or fund part of which is invested in said Common Trust Fund.

Questions Presented.

Since appellant's representation is limited to persons interested in income (R. 12) and no objections were filed on behalf of any person interested in principal (R. 35-6), no question is or can be raised herein as to the rights of any person interested in principal, *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 107.

No claim is, or ever has been, made by us that, in the present situation, the requirements of due process necessitate the personal service of a citation upon any, or all, of the persons interested in income of the common fund and of the underlying estates, trusts or funds. The Surrogate's opinion recognizes that no such contention was asserted (R. 117, fol. 174).

Hence the questions presented relate solely to the rights of persons interested in income with respect to procedural due process of law under the Fourteenth Amendment to the Federal Constitution. The questions posed are:

1. Does said Section 100-c authorize a judicial decree which deprives of property any of the persons interested in the income of a Discretionary Common Trust Fund and in the income of any trust, estate or fund part or all of which is invested in such Common Trust Fund?

2. Is due service of a notice in compliance with subdivision 12 of said Section 100-c sufficient to confer jurisdiction upon the Courts of the State of New York over all persons, including non-residents of the State of New York, who are interested in the income

of a Discretionary Common Trust Fund and in the income of a trust, estate or fund, part of which is invested in said Common Trust Fund because the notice and service thereof satisfy the requisites of "due process of law" under the Federal Constitution with respect to said persons?

3. Does this Court have jurisdiction of this appeal?

Summary of Argument.

Point First.

I.

Certain rights *in personam* against this Trust Company vested in the persons interested in the income of the forty-eight *inter vivos* trusts, which are shown by the record to have been established prior to the enactment of said Section 100-c. Such rights *in personam* vested in said persons at the time, and by virtue, of the creation of said *inter vivos* trusts.

Such rights *in personam* constituted property which vested in said persons prior to the effective date of said Section 100-c.

II.

It is settled, as a matter of statutory construction of a New York Act by the New York Courts, that said Section 100-c requires a judicial decree which takes such property away from the persons interested in the income of said forty-eight *inter vivos* trusts. Such interpretation of a New York statute is binding on this Court.

Point Second.

I.

Due process with respect to judicial proceedings requires the essentials set out below.

(a) That the State, from which the Court derives its authority possess jurisdiction over the subject matter. Appellant concedes that in this case the State of New York has jurisdiction over the assets of the common trust fund constituting the *res*.

(b) Where the judgment purports to destroy rights founded upon relations between persons, the State from whence the Court receives its power must have jurisdiction over the persons involved. Appellant further grants that in this case the State of New York has a limited jurisdiction over the persons, including non-residents, interested in the income of such of said 48 *inter vivos* trusts as have their situs of administration in New York. Such limited power is sufficient for New York to authorize its courts to render a judgment *in personam* against such persons to the extent necessary for the proper administration of the said fund, *provided this State require such a notice of hearing and opportunity to be heard as will satisfy due process of law.*

(c) That the interested parties must be provided with *reasonable notice* of the *precise time* and *place* of a *specific judicial proceeding* and an *opportunity to be heard.*

(d) Some supplementary method of service, such as mailing, must be supplied in addition to mere pub-

lication or service on a state official in a case where the State, although possessing a limited jurisdiction *in personam*, attempts to confer upon its courts power to take away rights *in personam*.

II.

The test of the adequacy of the notice under the due process clause is a practical one dependent upon the nature of the rights sought to be affected by the judicial power and upon all the circumstances of the case.

Although the names and addresses of the persons, including non-residents, who are currently interested in the income of said 48 inter vivos trusts, are on the books of the trust company, the Act requires a notice of hearing in which they are not named, and which is served by local publication only without mailing. Such notice violates due process of law even if the present proceeding were entirely in rem or were wholly quasi in rem.

A fortiori, since the decree herein purports to take away *personal rights* of said persons whose names and addresses are on the books of the Trust Company, service upon them by a local publication only, in which they are not named, and without mailing, contravenes due process of law.

III.

Not one of the thirty-one other jurisdictions in the United States, which have common trust fund statutes, has a provision for notice of hearing similar to that in the New York Act.

IV.

If said subdivision 12 is held to be unconstitutional no adverse effect upon a socially desirable aim will arise. The only result will be the amendment of the Act to incorporate a constitutional notice of hearing.

Point Third.

I.

This is an appeal from a final judgment of the highest Court of New York State in which a decision in such cause could be had, which involves a justiciable case, in which there was and is drawn in question the validity of a statute of said State on the ground of its repugnancy to the Federal Constitution and in which the decision of said Court is in favor of the validity of said statute.

II.

Since the New York courts, particularly the Court of Appeals, has settled the meaning of subdivision 14 of the Act, the said decision rests solely on a federal ground.

III.

A substantial federal question is involved.

POINT FIRST.

It has been settled by the New York Courts that said Section 100-c requires a judicial decree which deprives of property the persons who are interested in the income of the Discretionary Common Trust Fund by virtue of their interest in the income of the forty-eight *inter vivos* trusts, which were created prior to the enactment of said statute, parts or all of which trusts are invested in said Discretionary Common Trust Fund. Such interpretation of the meaning of this statute is binding upon this Court.

I.

The record discloses that the total number of trusts participating in said Common Trust during the period covered by the account, is 113 of which fifty-six are *inter vivos* trusts (R. 14-22; 106). The record further shows that forty-eight of such *inter vivos* trusts were created prior to July 15, 1937, the effective date of said Section 100-c and that said forty-eight *inter vivos* trusts were not amended subsequent to July 15, 1937 (R. 4, 5, 6, 7, 10, 11, 12). The earliest such trust was created on September 17, 1917, approximately twenty years before said Section 100-c became law (R. 12).

If we analyze the concatenation of jural relations which New York law classifies under the concept "trust" we find that there came into being at, and by virtue of, the creation of these forty-eight *inter vivos* trusts certain personal relations between the Trust Company and the said cestuis. These latter relations are characterized by the existence of certain personal duties on the part of the trustee to the per-

sons interested in income and the vesting in said cestuis, at the time of such creation, of corresponding personal rights against the trustee. Among these personal rights of the persons interested in income against the trustee are:

(a) the right to sue the trustee for damages resulting to the said cestuis from negligence or bad faith on the part of the trustee, *Matter of Clark*, 257 N. Y. 132; *Doyle* v. *Chatham and Phenix National Bank*, 253 N. Y. 369, 379-380; *Hinkle Iron Co.* v. *Kohn*, 229 N. Y. 179, 184;

(b) the right to compel the trustee to redress a breach of trust, *Matter of Mason*, 278 N. Y. 678; *Restatement of Trusts*, sec. 199; even where the trust *res* consists of real estate outside the State, *Smyrna Theatre* v. *Missir*, 198 N. Y. App. Div. 181; *Fernandez* v. *Fernandez*, 15 N. Y. App. Div. 469;

(c) the right to have the trustee render clear and accurate accounts with respect to the administration of the trust, *Matter of Kreischer*, 30 N. Y. App. Div. 313; Surrogate's Court Act, sees. 259, 260; *Restatement of Trusts*, sec. 172; Civil Practice Act, sec. 1308; *Matter of Harris*, 52 N. Y. Supp. 2d 195 (not officially reported, revd. on other grounds 269 N. Y. App. Div. 661);

(d) the rights of a general creditor against the trustee for any breach of trust, *Ferris* v. *Van Vechten*, 73 N. Y. 113; *Restatement of Trusts*, sec. 202(2).

We emphasize that these rights are *in personam*, *Lightfoot* v. *Davis*, 198 N. Y. 261, 272: that is, they

pertain to relations between persons as distinguished from relations *in rem*, that is, between a person and a thing.

These various specific personal rights which are vested in the persons interested in the income of these forty-eight *inter vivos* trusts are various aspects of the generic right of the persons interested in income to enforce the trust and constitute property which vested in said individuals at the time of the creation of the respective forty-eight trusts, *Schenck* v. *Barnes*, 156 N. Y. 316, 321. The New York Court of Appeals held in the cited case (p. 321):

> "A person for whose benefit a trust is created takes no estate or interest in the lands, but he can enforce the performance of the trust in equity, 1 R. S. 729 sec. 60. This right to enforce is a chose in action and personal property in the hands of the defendant Barnes in the case before us and liable in equity for his debts. *Tompkins* v. *Fonda*, 4 Page 448; *Payne* v. *Becker*, 87 N. Y. 153."

Section 39 of the New York General Construction Law, Book 21, McKinney's Consolidated Laws, p. 51, reads in part:

> "Sec. 39. *Property, personal.* The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything,

except real property, which may be the subject of ownership."

Sections 100 and 101 of the New York Real Property Law, Book 49, Part I, McKinney's Consolidated Laws, pp. 269, 272 read:

"Sec. 100. *Trustee of express trust to have whole estate.* Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

"Sec. 101. *Qualification of last section.* The last section shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property, subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those lawfully claiming under them."

That said Sections 100 and 101 of said Real Property Law apply to personal property is established by the decisions in *Williams* v. *Thorn*, 70 N. Y. 270, 273 and *Matter of Van Kleeck*, 95 N. Y. Misc. 40, 44, affd. 177 N. Y. App. Div. 917.

Even after Section 100 of the Real Property Law was enacted in its present form (Laws of 1909, ch. 52), the New York Court of Appeals followed in *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394 (decided

1923) its prior decision in *Schenck* v. *Barnes* (*supra*) and unanimously held per Cardozo, *J.* (p. 407):

> "The *trustee* of an express trust under our statute (Real Property Law ((Consol. Laws, c. 50)) Sec. 100) *has the whole title and estate. The beneficiary has a chose in action*, the right to enforce in equity the performance of the trust. *Schenck* v. *Barnes*, 156 N. Y. 316, 321, 50 N. E. 967, 41 L. R. A. 395."

Section 130 of the Restatement of Trusts runs:

> "The beneficiary's interest in a trust is property."

It follows necessarily that all the persons interested in the income of these forty-eight *inter vivos* trusts respectively, unlike beneficiaries under the common law, have no title not even an equitable one to the assets of their trust but have property consisting of said rights *in personam* to enforce the respective trusts against the Trust Company, which property vested in them prior to the enactment of Section 100-c of the Banking Law. In one case, such property vested approximately twenty years before the effective date of the Act (R. 12), in two others, at least eighteen years prior thereto (R. 4, 5), and in twenty-three others at least eight years prior thereto (R. 5, 10, 11).

When the parts or all of the said forty-eight *inter vivos* trusts were invested in the said Discretionary Common Fund, ownership of either part or all of the assets comprising the principal of the respective *inter vivos* trusts passed into the hands of the Trust Company as trustee of the Common Fund and the Trust Company as trustee of the respective *inter vivos* trusts received units of participation in said Common Fund (subd. 1, Appx. A, pp. 91-2; subd. 2, pp. 7-8;

R. 86). These units, however, gave the Trust Company, as trustee of the participant trust, no title to the assets of the common fund but gave the Trust Company as trustee of said trusts a right against itself as trustee of the common fund to enforce the common trust, *Schenck* v. *Barnes* (*supra*), *Whiting* v. *Hudson Trust Co.* (*supra*). However, the property previously vested in the persons interested in the income of these forty-eight *inter vivos* trusts, which property consisted of this generic right *in personam* to enforce the trust (this brief, pp. 18-22), was not divested by the creation of the Common Trust from said life beneficiaries, *Matter of Hoagland*, 74 N. Y. Supp. 2d 156 (not officially reported), affd. 272 N. Y. App. Div. 1040, affd. 297 N. Y. 920.

II.

The record shows from the mouths of appellees' witnesses (R. 39-40, 52, 53-54, 57) that the ends sought to be attained by the enactment of subdivisions 10 and 14 (Appx. A, pp. 97, 100) of said Section 100-c were the effectuation of this right of the life beneficiaries of the participant trusts to enforce the participant trusts and the proper termination at stated intervals of the corresponding liability of the Trust Company to such beneficiaries. When subdivision 14 of said Section 100-c is construed, as it must be, in the light of these purposes, *People ex rel. Pratt* v. *Goldfogle*, 242 N. Y. 277, 301, it is clear that the object and effect of said subdivision 14 is to take away this property previously vested in the life beneficiaries, consisting of said rights to enforce the participant trust, as to the period covered by the Common Fund accounting. (See also Am. Bankers Assoc., Handbook of Common Trust Funds, pp. 29, 47-48.)

Subdivision 10 of said Section 100-c (Appx. A, p. 97) requires the filing of the first account of the common trust fund, and also the petition for its judicial settlement, not less than twelve nor more than fifteen months after the date of the establishment of the fund and a similar account and petition triennially thereafter. By the decree settling the account herein the persons interested in the income of the said forty-eight *inter vivos* trusts have been stripped of all but one of the aforesaid personal rights, constituting property vested in them, as to the period covered in the account of the common fund. (This single exception is discussed later at p. 31 of this brief.) Subdivision 14 of said Section 100-c (Appx. A, pp. 100-1) specifically so provides and reads in part:

> ". . . Subject to the limitations set forth in subdivision nine hereof *the decree in such proceeding* unless reversed or modified on appeal *shall be thereafter binding and conclusive* in respect of any matter set forth in the account settled by such decree in all courts *upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.*"

It is important to note that subdivision 14 is binding not only on those having an interest in the common fund but also on all parties having any interest in "any estate trust or fund held by such trust company . . ."

This construction of subdivision 14, stated above, has been placed upon the statute by every decision interpreting it. In the instant case the Surrogate held that the decree on accounting "settles all ques-

tions respecting the management of the common fund" (R. 112, fol. 167). To the same effect are *Matter of Bank of New York*, 189 N. Y. Misc. 459 at 470; *Matter of Security Trust Co. of Rochester*, 189 N. Y. Misc. 748, 760; *Matter of Continental Bank and Trust Co.*, 189 N. Y. Misc. 795, 797; *Matter of Hoagland, supra.* As stated, the termination of such rights of the beneficiaries by judicial accountings for the common fund was one of the purposes of subdivision 14 according to one of the draftsmen of this legislation (R. 52, 53-54).

Consequently the decree herein is binding on the persons interested in the income of the said forty-eight *inter vivos* trusts and the issues as to which such decree is binding are

> ". . . whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof" (*Matter of Bank of New York*, 189 N. Y. 459, at p. 470).

Now the duty to properly manage "the fund so as to secure the participants their rights in . . . income thereof" is the duty correlative to the generic right *in personam* to enforce the respective participant trusts, which right is property vested in the persons interested in the income of said forty-eight *inter vivos* trusts. Since the final decree herein orders that the Trust Company "be, and it hereby is fully and finally released and discharged of and from any and all liability and accountability for each and all of its acts and proceedings as such Trustee, as embraced in said account of proceedings and in this decree"

(R. 189, fol. 294), it necessarily follows that said final decree has taken away from the persons interested in the income of said forty-eight *inter vivos* trusts their correlative right to enforce their respective trusts as to the period embraced in the account herein.

In short, the duty cannot be destroyed without the necessary and simultaneous destruction of the correlative right of having the duty performed, *Estin* v. *Estin*, 334 U. S. 541, 548-549.

To put the matter concretely, the present account discloses principal received in the total of $2,926,328.07 (R. 144, fol. 219), decreases thereon of $466.05 (R. 144, fol. 219) and total income collected in the amount of $53,313.33 (R. 145). If we were to assume that, through the negligence or self-dealing of the trustee, losses or diversions of sixty per centum were suffered as to both principal and income then the account would reflect decreases of $1,755,796.84 on principal and of $31,988.00 on income. [*Such hypothesis is reasonable* in view of the approximately 85 per centum decline of industrial stocks listed on the New York Stock Exchange during the time between September 1929 and May 1932 (Standard & Poor's 50 Industrial Stocks Index) and of Bogue's conclusion that "One of the primary objections to common trust funds has been the fear that the trust company would use it as a dumping ground for its own shaky and depreciated securities" (5 Law and Contemporary Problems 430 at 435).]

In such circumstances the said income beneficiaries herein would have the personal right to sue the trustee for damages, *Matter of Clark, supra; Doyle* v. *Chatham and Phenix National Bank, supra; Hinkle Iron Co.* v. *Kohn, supra*, the right to compel the trustee to redress the breach of trust, *Matter of*

Mason, supra, and would have a personal claim as general creditors against the trustee, *Ferris* v. *Van Vechten, supra.*

If we were also to suppose that no objections were filed in this accounting of the common fund and that a final decree were entered settling such account as filed, then, upon the later respective accountings in the respective underlying trusts and estates by this same trust company, which is trustee of the common fund (Subd. 1, Appx. A, pp. 91-2) but in its several capacities as fiduciary of each of the respective participating trusts and estates, the respective income beneficiaries of such estates and trusts would find themselves barred by said decree from objecting to the losses or diversions caused to their participant trusts by the mismanagement of the common fund, *Matter of Roche,* 259 N. Y. 458, 461; *Hull* v. *Hull,* 225 N. Y. 342, 353.

The trustee-appellee conceded this in its brief to the Appellate Division (p. 40) and in its brief to the Court of Appeals, stating (p. 15), "*To the extent that it affects or forecloses rights of the beneficiaries of the participating trusts, it may be regarded as pro tanto an accounting for the respective trusts.*"

The special guardian for principal in this proceeding in his brief to the Appellate Division in effect also granted this by adopting (p. 1) the statements in the trustee's brief and by stating (pp. 4-5) ". . . judicial approval of the transactions of the trustee of the Common Trust Fund bears upon the property interests of those beneficially owning the funds invested in units of participation in the Common Fund . . ." However, in his brief (pp. 4-7) to the New York Court of Appeals in this proceeding and on oral argument the said special guardian for principal, for the first

time in any Court, contended that, under a proper construction of subdivision 14, if the Trust Company, as trustee of the common fund, were guilty of negligence or self-dealing in the administration of the common fund and secured a decree settling the common fund account as filed without surcharge such decree would not bar a beneficiary of a participant trust, who had not appeared in the common fund accounting, from surcharging the Trust Company as trustee of the participant trust, on a later accounting for such participant trust, for failing to withdraw the participation from the common fund when it necessarily knew that, as trustee of such common fund, it was about to commit such acts of negligence or self-dealing in the administration of the common fund. The special guardian for principal cited no case in support of this novel interpretation of subdivision 14 of said Section 100-c. The said special guardian further maintained (pp. 4-7) that although the decree settling the common fund account necessarily settled the issues of the Trust Company's negligence or self-dealing in the administration of the common fund, yet such issues could be relitigated on the subsequent account for a participant trust because, as a matter of statutory construction, the common fund accounting is entirely *in rem* and *the notice of hearing used in the common fund accounting was insufficient to give the Court jurisdiction over the beneficiaries of the participant trust.*

It is apparent that the special guardian for principal is arguing in a circle. He assumes that proceeding on the common fund account is wholly *in rem* and then deduces from such assumption an interpretation of subdivision 14, which is contrary to its explicit language and destructive of the ends for which

it was enacted. His construction is to the effect that the decree on the common fund account was not intended to be binding on the persons interested in the trusts, estates or funds participating in the common trust fund unless they appeared in such proceeding.

The decision as to whether a proceeding is, or is not, *in rem* depends upon the nature of the rights sought to be affected by the decree or judgment. This in turn depends upon the proper interpretation of the statute establishing the proceeding. If, as a matter of statutory interpretation, the object of the proceeding established by the statute is to affect rights *in personam*, the proceeding must be at least partly *in personam*: if the aim be to affect only rights in specific property, then it is *in rem*, *Hanna* v. *Stedman*, 230 N. Y. 326, 333-335.

In our brief (pp. 17-23) to the Court of Appeals in this proceeding and on oral argument to such Court we maintained that the construction urged by the special guardian for principal nullified subdivision 14.

If the meaning assigned to subdivision 14 by the special guardian-appellee were correct, and the accounting were wholly *in rem*, no question of *jurisdiction over persons* could have been at issue in the Court of Appeals and said Court refuses to answer certified questions which raise points that are *not* essential to the decision (*Gray* v. *Vought & Co.*, 243 N. Y. 585-586).

The New York Court of Appeals flatly rejected his construction of subdivision 14 and adopted ours by its affirmative answer to the first question, certified by the order of the Appellate Division allowing the appeal (R. 219-220), thus holding that "due service of a notice pursuant to Subdivision 12 of Section 110-c of the Banking Law" is "sufficient to confer *juris-*

diction over persons interested in the income of a common trust fund, . . .", and thus necessarily ruled that the present proceeding is partly *in personam*, 299 N. Y. 697, 698 (R. 243, fol. 245).

Moreover, if the said construction by said special guardian for principal were sound then the decree settling the account of the Common Fund did not deprive any of the persons, interested in the common fund by reason of their interest in a participant trust, of property since the only property such persons have is the personal right to enforce the respective participant trust, *Schenck* v. *Barnes, supra; Whiting* v. *Hudson Trust Co., supra.* From all this it follows that it would not have been necessary for the New York Court of Appeals in this proceeding to have answered the constitutional question posed in the order of the Appellate Division allowing the appeal (R. 219-220). The said Court of Appeals does not pass on constitutional questions unless such determination is essential to the decision of the appeal, *Hanrahan* v. *Terminal Station Commission*, 206 N. Y. 494, 504.

Since the said Court of Appeals did reply to said question in the affirmative, 299 N. Y. 697, 698 (R. 243, fol. 245), it necessarily follows that said Court thereby settled the meaning of subdivision 14 of said Section 100-c to be that asserted by us. This interpretation of the statute is binding on this Court, *Kovacs* v. *Cooper*, —— U. S. ——; 93 L. Ed. 379, 385; *Terminiello* v. *Chicago*, —— U. S. ——; 93 L. Ed. 865, 867.

On such later accounting for one of the respective forty-eight *inter vivos* trusts, all the assets of which are invested in the Common Fund, such later account for the participant trust would consist merely of a

statement of the amount so invested, the present value, the loss of sixty per centum in value, the income received and a reference to the prior account of the Common Fund previously judicially settled. There would be no accounting for the operation of the Common Fund (subd. 15, Appx. A, pp. 101-2).

It is true that on the subsequent accounting for one of the 48 individual trusts the income beneficiary thereof could question the right of the trust company, as fiduciary of the participating trust, to have invested in the common fund, *Matter of Bank of New York, supra; Matter of Hoagland, supra.* The reason for such ruling is that the decree herein is a Surrogate's decree and by the terms of subdivision 3 (Appx. A, pp. 92-3), the right to invest in a discretionary common fund is made dependent upon the judicial construction of the instrument creating the individual trust. Under New York law a Surrogate has no jurisdiction to construe either an instrument creating an *inter vivos* trust, *Matter of Lyon*, 266 N. Y. 219, 224, or a will probated in another county of the State, *Matter of Security Trust Co. of Rochester, supra*, p. 753. (See also *Matter of Bank of New York, supra*, p. 469). In brief, this single exception arises in this proceeding from a combination of two factors to wit, the language of subdivision 3 of the Act and the limited nature of a Surrogate's jurisdiction under New York law. Therefore no inference can be drawn from this exception that the common fund account is wholly *in rem* or that the decree on such account is not binding, on the persons interested in the said 48 trusts, as to administration as distinguished from the right to invest. But if this issue as to investment were decided adversely to the income beneficiary he would be barred on such later

accounting, by the prior decree on the common fund accounting, from objecting to the losses caused to his participant trust by the mismanagement of the common fund.

This is the precise holding in *Matter of Hoagland*, 74 N. Y. Supp. 2d 156, 163-164 (not officially reported), affd. 272 App. Div. 1040, affd. 297 N. Y. 920, in an accounting proceeding in an individual testamentary trust under a will probated in the same county as that of the common fund account. The Surrogate upheld the right of the same trust company, which was the common trustee in *Matter of Bank of New York* (*supra*) but now acting as trustee of said testamentary trust, to make an investment therefrom in shares in said discretionary common trust fund of which it was the common trustee. The Court further overruled an objection to the failure to amortize premiums on securities purchased in the common fund, on the ground that such objection was barred by the prior decree on the accounting of the common fund (*Matter of Hoagland, supra*).

The Surrogate stated in *Matter of Hoagland* (*supra*, at pp. 163-164):

> "While the form of the objection does not in terms say that the subject matter is open here despite any accounting for the common trust fund itself, *the court regards the objection as raising issue respecting the court's jurisdiction over such a fund and respecting the effect of a decree settling an account for such a fund. . . .*
>
> "Because the question of amortization is solely a matter of the internal administration of the common fund the objection which here seeks amortization of a premium paid by the common fund is overruled."

The appellants in the cited case in their brief to the New York Court of Appeals (p. 15) recognized that this was the basis on which the Surrogate overruled their objection and argued against it. Since the question was argued in the said Court of Appeals its unanimous affirmance without opinion must be taken as approval of the proposition that the decree on a common trust fund account bars persons, interested in a trust which is a participant in a common trust fund, from raising in a subsequent accounting of the participant trust any question as to the administration of the common trust fund, even though such foreclosure necessarily deprives such persons of their right to enforce their individual trust *pro tanto*.

Any different interpretation of the statute would require the nullification of subdivision 14 of Section 100-c. The interpretation of subdivision 14 urged by the Special Guardian for principal to the Court of Appeals would render the common fund accounting a useless and expensive proceeding.

The limitations in subdivision 9 (Appx. A, pp. 94-5) do not affect this construction but relate to the effect of failing to send the notice of the first investment in the common trust fund.

We submit that it is clear to the point of demonstration: (a) that said Section 100-c requires the exercise of judicial power which deprives the said persons, interested in the income of said forty-eight *inter vivos* trusts, of property which vested long before the enactment of said Act; (b) that such construction is the one placed upon the statute by the New York Court of Appeals in this proceeding, and by every other decision interpreting the Act; (c) that such interpretation of the meaning of subdivision 14 is binding on this Court.

POINT SECOND.

Due service of a notice in compliance with subdivision 12 of said Section 100-c is not sufficient to confer jurisdiction upon the New York Courts over persons, including non-residents of New York, who are interested in the income of the aforesaid forty-eight *inter vivos* participant trusts and also in the income of said Discretionary Common Trust Fund, because said notice and the service thereof do not satisfy, as regards said persons, the requirements of the Fourteenth Amendment to the Federal Constitution relating to procedural due process of law.

I.

Some of the Fundamental Requisites of "Due Process".

Some of the basic requirements of "due process" with respect to judicial proceedings are those listed below.

The State, from which the Court derives its authority, must possess jurisdiction over the subject matter or *res* affected by the judgment. *Restatement of Conflict of Laws*, sec. 43; *American Land Co.* v. *Zeiss*, 219 U. S. 47.

Where the judgment purports to destroy rights *in personam*, *i. e.*, those founded upon relations between persons, the State from whence the Court receives its power must have jurisdiction over the persons between whom the relation exists. *Restatement of Conflict of Laws*, sec. 43; *Pennoyer* v. *Neff*, 95 U. S. 714.

The interested parties must be provided with reasonable notice of the *precise time and place* of a *specific judicial proceeding* and *an opportunity to be heard,* whether the proceeding be *in rem, quasi in rem* or *in personam. Hassall* v. *Wilcox,* 130 U. S. 493, 504; *Priest* v. *Las Vegas,* 232 U. S. 604; *Windsor* v. *McVeigh,* 93 U. S. 274, 278-284; *Jacob* v. *Roberts,* 223 U. S. 261, 265-267; *Grannis* v. *Ordean,* 234 U. S. 385, 393; *McDonald* v. *Mabee,* 243 U. S. 90, 92; *Griffin* v. *Griffin,* 327 U. S. 220, 228; *Roller* v. *Holly,* 176 U. S. 398, 409; *Restatement of Conflict of Laws,* sec. 75.

Some supplementary method of service, such as mailing, must be provided in addition to mere publication or service on a state official, in a case where a State, possessing a limited personal jurisdiction over the defendant, attempts to confer upon its courts power to take away any of his rights *in personam, McDonald* v. *Mabee, supra; Webster* v. *Reid,* 52 U. S. 437; *Wuchter* v. *Pizzutti,* 276 U. S. 13.

II.

Jurisdiction Over the Subject-Matter or *Res.*

Jurisdiction is defined as "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states" (*Restatement of Conflict of Laws,* sec. 42) "*The creation of interests may be either the creation of a new interest or the change or abolition of an existing interest*" (op. cit. sec. 42, comment b).

For the purposes of this argument, we assume that the State of New York has jurisdiction over the assets of the common trust fund constituting the *res, Hutchi-*

son v. *Ross*, 262 N. Y. 381; *Restatement of Conflict of Laws*, sec. 299. Therefore there is no issue raised herein relating to the jurisdiction of such State over the assets of the common trust fund.

III.

Jurisdiction Over Persons When the Judgment Also Purports to Destroy Rights *in Personam*.

Since a right *in personam* "is a legally enforceable claim of a person against another that the other shall do a given act or shall not do a given act" (*Restatement of Conflict of Laws*, sec. 42, comment b), it is an essential deduction that rights *in personam* are founded upon intangible relations between persons.

It further necessarily follows that in order to destroy such intangible relations the State must have jurisdiction over the persons between whom such intangible relations exist. Such is the exact ruling of this Court in a recent decision *Estin* v. *Estin*, 331 U. S. 541, decided June 7, 1948, wherein the Court held (p. 548):

> "Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations . . ."

Since such power can be based on an implied consent, *Wuchter* v. *Pizzutti*, 276 U. S. 13, or on certain minimum contacts with the jurisdiction, *International Shoe Machinery* v. *Washington*, 326 U. S. 310, we also presume, for the purposes of this discussion, that the State of New York has a limited personal jurisdiction over such of the non-resident

persons who are interested in the income of the common trust fund by virtue of their interest in the income of such of the 48 underlying trusts as have their situs of administration in New York, which is adequate for the State to authorize its courts to render a judgment *in personam* against such interested individuals to the extent only that it is necessary for the proper administration of the common trust fund, *provided that the State require such a notice of hearing and opportunity to be heard as will satisfy "due process".*

It is well established that a statute is unconstitutional which authorizes the destruction of rights *in personam* by the exercise of judicial power if the enactment fails to require such a notice of hearing and opportunity to be heard as accords with the standards of "due process", even though the State has jurisdiction over the subject matter and over the person whose rights *in personam* are destroyed, *Wuchter* v. *Pizzutti, supra, McDonald* v. *Mabee, supra.*

Consequently the single narrow issue before this Court on this point is whether or not Section 100-c is unconstitutional because the notice of hearing it requires does not come up to the norm set by "due process".

IV.

The General Requirements of the Notice in All Situations Concerning Private Litigants.

The notice must be such "as to make it reasonably probable that he will receive actual notice". *Grannis* v. *Ordean*, 234 U. S. 385, 393; *Wuchter* v. *Pizzutti*,

276 U. S. 13, 19. This is obvious because "it is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose". *Roller* v. *Holly*, 176 U. S. 398, 409.

The detailed analysis of the facts made by this Court in *Grannis* v. *Ordean* (*supra*, at pp. 391-398) demonstrates that the test of the adequacy of the notice under the "due process" clause is a practical one dependent upon *the nature of the rights affected by the judicial power* and all the other circumstances of the particular case, *Missouri* v. *North*, 271 U. S. 40, 42.

V.

The Factual Situation.

When we examine the circumstances in the present proceeding we find existing the following constellation of facts, each of which must be weighed separately, and all collectively, in determining whether or not the notice of hearing authorized by said subdivision 12 (Appx. A, pp. 98-9) meets constitutional requirements:

(i) *Section 100-c places upon the Trust Company* herein, which necessarily and simultaneously is trustee of the common trust fund and a fiduciary of each of the underlying estates, trusts and funds, including the said forty-eight *inter vivos* trusts, *conflicting loyalties* (this brief, p. 8). This conflict of loyalties is exemplified in *Matter of Hoagland* (*supra*).

(ii) As Bogue points out (5 *Law and Contemporary Problems* 430 at 435), common trust fund legislation including Section 100-c *does not eliminate the oppor-*

tunities for self-dealing by the trustee of the common fund.

(iii) *The proceeding for the settlement of the account of a common trust fund is the only one in which persons interested therein can call the Trust Company to account* (this brief, pp. 69-70), and the decree settling such account has destroyed for the period covered by the account the following rights *in personam* of the income beneficiaries of the said *inter vivos* trusts: the right to sue the trustee for damages to the said *inter vivos* trusts resulting to the said *cestuis* from negligence or bad faith on the part of the trustee; the right to compel the trustee to redress a breach of trust; the rights as general creditors against the trustee for any breach of trust (this brief, pp. 18-33).

(iv) We find that *the names and current addresses of every person currently interested in the income of the common fund are continuously known to the Trust Company as trustee of the common fund and appellees' witnesses so testified on cross examination* (R. 43; 48, fol. 75; p. 49, fol. 76). *Apart from any testimony this always must be the case* because, under the terms of subdivision 1 of the Act (Appx. A, p. 91), the trustee of the common fund must always be at least one of the fiduciaries of each underlying trust or estate which is a participant in the common fund and is under a duty to pay or apply the income to the income beneficiary. *Matter of Bearns*, 251 N. Y. App. Div. 222, aff'd 276 N. Y. 590; *Restatement of Trusts*, sec. 172. As to the persons who may be entitled to income in the future, in the unlikely event that their names and addresses are unknown to the trustee, *it is certain that, with all its widely advertised*

facilities, a modern trust company which is sensitive to its duties as a fiduciary could ascertain readily, with reasonable diligence the names and addresses of those to whom, by reason of the death of the current life beneficiary, it may be required at a moment's notice to pay income.

(v) We also learn that during the period accounted for herein there were one hundred and thirteen estates or funds participating in the common fund, of which fifty-six were *inter vivos* trusts and fifty-seven were testamentary trusts (R. 14-22, 106). Thus it is apparent that the number of persons currently interested in the income of the common fund during said period did not greatly exceed one hundred and thirteen (R. 106). *The number in this proceeding could not exceed three hundred and fifteen* because, as demonstrated above, the trustee of the common fund necessarily knows the names and addresses of all persons currently interested in income and the testimony is that the total of all known persons, whether interested in principal or income, is approximately three hundred and fifteen (R. 42).

While it is true that the statute does not, in so many words, place a ceiling on the number of participating trusts or funds and does not specifically limit the quantity of persons interested in income, yet a reasonable interpretation of the statute would limit them at the point where the fund becomes unworkable (R. 51).

To render the statute to permit inclusion of an unlimited number of participating trusts would allow the investment of fifty billion underlying funds. To manage the common fund or give any notice at all, obviously would be impossible in such case. Such a construction would result in a circumvention, by

definition, of the constitutional requirements of notice and hearing, and could not be based on the argument bottomed on necessity since the Act and the Regulations authorized thereunder permit a trust company to set up as many common trust funds as it may desire (subdivision 1, Appx. A, p. 91; R. 63). Consequently there is no reason for permitting such fund to become so large that the Constitution cannot be complied with.

(vi) We also find that *it is wholly feasible that a notice of the application for judicial settlement be given by mail to those currently interested in income.* Indeed, appellees' witnesses admitted this on cross examination (R. 42-43; 48, fol. 75; p. 49, fol. 76; p. 57). That all difficulties with respect to service by mail are confined to persons interested in principal is apparent from the testimony of respondents' witnesses (R. 39, fol. 63; pp. 46-47, p. 53, fol. 81). As Justice Van Voorhis aptly expresses it in his dissenting opinion herein (R. 165):

> "The names and addresses of these last are on the books of the fiduciary. . . . Such persons are required to be notified, as above stated, of the first investment in the common fund. *They could just as easily be notified of the judicial settlement.*"

(vii) The record discloses that the trust company has made investments in the common fund from trusts where the persons interested in income are non-residents (R. 8, fol. 14, pp. 46-47). The lack of such proof would be immaterial because by the terms of subdivision 1 (Appx. A, p. 91), all the income beneficiaries of all the underlying funds could be

non-residents since investments in the common fund is not limited to such trusts or funds only as have resident income beneficiaries only. In truth the last sentence of said subdivision 1 shows that *the Act permits investment from underlying trusts whose individual situs of administration is some other "state or country"*. It is a fact of common experience that almost every trust has at least one non-resident beneficiary (R. 46-47). To construe the Act so as to limit participation in common trust funds to estates or funds which have resident income beneficiaries only, is to destroy it. It is elementary that the test of the constitutionality of a statute is what may be done pursuant to a reasonable interpretation thereof, not what has actually been done in a particular case, *Wachter* v. *Pizzutti*, 276 U. S. 13, at p. 24.

(viii) The record does not reveal the nature of the individual assets constituting the corpus of the common fund. The absence of such information is unimportant because, since the common fund in question is a discretionary one, such assets could consist *partly of mortgages on real property outside the State or wholly of common stocks* (subds. 3, 4; Appx. A, pp. 92-4; R. 84, 70).

(ix) The proceeding in which such notice of hearing is required is one between private persons as distinguished from an action in which the plaintiff is the sovereign or an agency properly enforcing a power of the sovereign.

VI.

The Provisions of Section 100-c as to Notice.

Turning now to the statute, it appears that two types of notice are provided for:

a notice of the accounting proceeding is directed by subdivision 12 of the Act (Appx. A, pp. 98-9);

a notice of the first investment in the common fund is ordered in subdivision 9 (Appx. A, pp. 94-6).

VII.

The Notice Required by Subdivision 12.

It is apparent that the only notice required by subdivision 12 is one having the characteristics set out below.

First, a notice *in which none of the persons currently interested in income need be named despite the fact that the name of each is of necessity known to the trustee of the common fund* (this brief, pp. 39-40).

Second, one *in which the residence of the donor or testator need not be set forth* although it is possible that the similarity of the names of some of the donors or testators may be such that the only possible identification of them is by residence (subds. 12, 11, Appx. A, pp. 98-9, 97-8).

Third, a notice the only service of which is by publication once a week for four successive weeks in a local newspaper designated by the court; *no mailing*

nor other supplementary form of service is required, although the address of each person currently interested in income is necessarily known to the said trustee (this brief, pp. 39-40).

Fourth, a process in which there is no seizure of the *res* (subd. 12, Appx. A, pp. 98-9).

Fifth, one as to which there is no discretion vested in the Court except to select the newspaper in which the publication is to be made (subd. 12, Appx. A, pp. 98-9).

Sixth, one whose physical makeup and appearance as published is such as to raise grave doubts of its notifying efficacy. For the convenience of the appellate courts herein, the citation has been printed in the record (R. 24-32) instead of being reproduced therein by photostat. As so printed it extends over thirteen pages of clear readable type. As published in the New York Law Journal it occupied 1½ columns of fine print. Consequently a person interested herein, for example, in the income of the trust under the indenture dated September 17th, 1917 made by George P. Cammann (R. 31, fol. 50) would have to check approximately 392 lines of eye-taxing print in order to ascertain whether or not he would be affected by the proceeding. Such an operation required approximately 15 minutes for the writer of this brief to accomplish. Since such operation consumed 15 minutes where the trust contained only 113 participant trusts, it would require approximately 3½ hours if the common trust fund contained 1,607 participant trusts as does the discretionary fund of the Pennsylvania Company (R. 54). The testimony is that "a big New York

City bank could put in presumably more than that" (R. 54, fol. 83). Serious doubts must certainly be entertained as to the validity of a published notice which places such a burden upon a beneficiary of a trust who, perchance, saw it.

Seventh, a notice which is illusory (R. 167). The best test of the efficacy of the notice is experience. "The life of the law has not been logic: it has been experience" (Holmes: The Common Law). There have been at least five accounts of Common Trust Funds which have been settled by judicial decree in New York. They are, in addition to this proceeding, *Matter of Bank of New York*, 189 N. Y. Misc. 459; *Matter of Security Trust Co.*, 189 N. Y. Misc. 748; *Matter of Continental Bank and Trust Co.*, 189 Misc. 795; *Matter of Bank of New York* (settled in 1949 but not reported).

Although *there are more than 2,000 beneficiaries* of the trusts estates and funds participating in said Common Trust Funds (R. 49-50), *there hasn't been a single appearance in any of the five accountings*, including this proceeding, *by any one of the said beneficiaries* as an examination of the foregoing decisions will disclose. One must ignore reality to maintain that a form of notice of hearing is reasonably calculated to give actual notice and an opportunity to be heard when such notice has not been productive of a single appearance in five separate legal proceedings involving over 2,000 persons.

VIII.

The Failure to Name Known Interested Persons in the Notice of Hearing Violates "Due Process" Even if the Proceeding Be Wholly *in Rem* or Wholly *Quasi in Rem*.

Turning to the law of "due process", we learn that this Court has definitely decided, in the case of *Priest* v. *Las Vegas*, 232 U. S. 604, that, *even in a wholly in rem proceeding to quiet title to land within the State brought by a plaintiff other than the government*, a notice, served only by publication without mailing to *known residents* named only as "*unknown claimants*", violated due process, was insufficient to bind such residents as to title to land within the State and was insufficient to make such residents parties to the proceeding.

That *Priest* v. *Las Vegas* (*supra*) is still the controlling authority on these points is evidenced by the fact that this Court cited said case with approval in 1935 in *United States* v. *Oregon*, 295 U. S. 1, 12, and in 1936 in *Washington* v. *Oregon*, 297 U. S. 517, 528, as authority for the principle that persons not parties to the proceeding are not bound by the judgment or decree; *hence that such service is insufficient to make such persons parties.* Moreover, careful research has failed to uncover any decision weakening *Priest* v. *Las Vegas* (*supra*) in the slightest degree.

This Court said in *Priest* v. *Las Vegas* (*supra*, at p. 613):

> "The court commented upon the abuse which may be made of statutes providing for constructive service and the necessity to so construe them

as *'to hold that where the real owner may be brought into court by name his property may not be taken by an advertisement against unknown owners'* and that where, 'as in this case the locus of the title is definitely declared of record and such is confessedly known to the complainant, *it is but an exaction of good faith that the holder of such title should be summoned by name in order that he may appear and defend. To exact less is to open the doors wide to insidious attacks upon property rights . . .*' ".

Fraser cites *Priest* v. *Las Vegas* (*supra*) as authority for this rule which he expresses thus:

> "Where the action is brought by a *private person . . . known claimants must be designated by name whether the action be quasi-in-rem* or *in rem*" (34 Cornell Law Quarterly, p. 41).

In the present proceeding, subdivision 12 cannot be construed as requiring the naming in the published citation of the persons currently interested in income unless there is deleted from said subdivision the direct mandate that:

> ". . . the petitioner shall cause to be issued by the court . . . a notice or citation *addressed generally without naming them* to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition. . . ."

Now if "due process" is violated by a wholly *in rem* proceeding brought by a private person wherein known residents of a State, served by publication against "unknown claimants", are deprived of rights

in rem to land situate within the State, *then, a fortiori, "due process" is violated by Section 100-c of the Banking Law which necessitates the destruction of substantial rights in personam of the persons currently interested in income, whose names and addresses are known and who may be non-residents, by a proceeding in which the only service of process upon such known persons is by a local publication in which they are not named, without any supplementary form of notice.*

That it is essential to name in the summons or citation the known persons interested even in a wholly *quasi in rem* proceeding is also demonstrated by the elaborate consideration given, by this Court in *Grannis* v. *Ordean* (*supra*), to the question of whether a misspelling of the name of one of the defendants in the summons amounted to a lack of "due process". See also *Meyer* v. *Kuhn*, 68 Fed. 705.

Grannis v. *Ordean* (*supra*) involved a suit *quasi in rem* for a partition of land within the State. Unlike subdivision 12, the statute there provided for service *by publication and mailing* on persons who could not be found within the State. The Court stated:

> "The precise question . . . is whether, under the circumstances, a service by the publication and mailing of a summons in the partition suit, naming as party and addressee 'Albert Guilfuss Assignee' and 'Albert B. Guilfuss' constituted due process of law conferring jurisdiction to render a judgment binding upon Albert B. Geilfuss Assignee, *with respect to his lien upon or interest in the land*, he not having appeared" (pp. 391-392).
>
> "*Of course, in a published notice or summons intended to reach absent or non-resident defendants, where the name is a principal means of*

identifying the person concerned somewhat different considerations obtain. The general rule, in cases of constructive service of process by publication, tends to strictness, Galpin v. *Page*, 18 Wall. 350, 369, 373, *Priest* v. *Las Vegas*, 232 U. S. 604" (p. 395).

The Supreme Court held in the cited case that there was "due process" *but placed its decision squarely on its conclusion that the two copies of the summons mailed "would reach—indeed, that they did reach—the true Albert B. Geilfuss in Milwaukee"* (p. 398).

In the present proceeding, the trustee adventitiously may have set forth in the citation the names of some of the respective persons for whose benefit the respective trusts or estates were originally created (R. 24-31). This has no bearing on the question at issue for two reasons: first, *the constitutionality of a statute is judged by what may be done under a reasonable construction thereof, not by what has been done in a specific case, Wuchter* v. *Pizzutti, supra*, and subdivision 12 *orders* that *none* of the interested persons shall be named in the citation (this brief, p. 43); second, it is not necessarily true that the persons who were designated by the creator as primary life beneficiaries are the same persons who were interested in income during the period covered by the account, since the donor or testator may have created secondary life interests and the primary life beneficiaries may have died prior to the period accounted for.

Subdivision 12 of the Act directs that "the residence of any such decedent or donor of any such estate, trust or fund" shall not be set forth in the citation. Since there are at least one hundred and thirteen

persons interested in income in the present proceeding and since the number of such persons may become larger it is apparent that similarities in the names of donors or decedents may occur, in which situations the statement in the citation of the residences of such may aid in their identification. *Thus the persons currently interested in income are deprived by the statute of even this slight means of differentiation.*

IX.

The Provisions of the Act for Notice of Hearing Are Contrary to the Long-Established Policy of New York.

Taking up now the question of the adequacy for "due process" of service by publication alone, *even where the defendants are named but without any other form of notice*, a study of New York law reveals that practically every statute relating to constructive service, other than subdivision 12 of Section 100-c of the Banking Law, requires the mailing of the summons or citation where the name and address of the person interested is known or can be ascertained by reasonable diligence (Appx. B, pp. 102-105).

The said enactments dealing with many and varied situations ranging from *in rem* proceedings concerning land within the State to substituted service on residents, constitute compelling evidence that *it is the considered judgment of the legislature that service by publication alone, without mailing, on persons whose names and addresses are known, even when the defendants are named in the summons, does not comply with the requirements of "due process".* The following comments of the Judicial Council of New

York State support this contention (Eighth Annual Report, 1942, pp. 328-329):

> "In other situations, *mailing*, generally, theoretically only supplements another mode of service, but *actually plays a much more important part.* Ordinary mail is used in connection with the affixing of the summons to the defendant's door pursuant to an order for substituted service, and with publication of the summons pursuant to an order for service by publication. *Often the only notice that the defendant receives in the latter case is through the mailing and not through the publication.*"

X.

There Are No Saving Clauses in the Act.

There is no provision in the Act for giving notice by a seizure of the assets of the common fund, which constitutes the *res*. Even if there were, it is difficult to see how such seizure would give any notice to the persons currently interested in income since they do not "have any ownership in any particular asset or investment of such common trust fund" (subd. 2, this brief pp. 7-8) and would receive no notice whatever from the seizure.

There is no provision of the Act vesting discretion in the Court to change the type of citation specified (subd. 12, Appx. A, p. 98; *Matter of Security Trust Co. of Rochester, supra*, at p. 772).

XI.

As to Adult Competent Persons the Appointment of Statutory Guardians Is a Denial of the Opportunity to Be Heard.

Subdivision 12 provides for the appointment by the Court, on the accounting of the common fund, of two Special Guardians: one to appear for infants and incompetents and also "*for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund*"; the other to appear for infants and incompetents and also "*for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund.*" This subdivision further specifies that "each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

The appointment of Special Guardians for infants and incompetents who do not otherwise properly appear is necessary and salutary (New York Surrogate's Court Act, sec. 64, Book 13, Gilbert Bliss, pp. 93-94; New York Civil Practice Act, sec. 1313, Book 6B, Gilbert Bliss, p. 124). On the other hand, *it is impossible to cure the lack of notice of the hearing to adult competent individuals by the appointment of a statutory representative.* Such appointment is in no way calculated to give any notice of the hearing to the persons currently interested in income all of whom are known to the trustee. The Act does not require

the special guardian to give any notice at all. *The real effect of such appointment with respect to adult competent persons interested in income is to destroy their right to counsel of their own selection. But to take away from adult competent persons the right to choose counsel is to take away in effect the opportunity to be heard, Roberts* v. *Anderson*, 66 Fed. 2d 874, 876-877; *Cooke* v. *U. S.*, 267 U. S. 517, 537; *Powell* v. *Alabama*, 287 U. S. 45, 68-70.

XII.

The Notice of the First Investment Fails Utterly to Serve as a Notice of Hearing.

With respect to persons interested in income, subdivision 9 of the Act (Appx. A, pp. 94-5) requires the trustee "At the time of making the first investment of any estate, trust or fund in a common trust fund" to "send a notice to each person of full age and sound mind *whose name and address is known to such trust company* at the time of sending such notice and *who is then known to it to be or to claim to be included in . . .* (a) *those then entitled to share in the income therefrom. . . .* Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional money of such estate, trust or fund may be invested in such common trust fund without further notice. *No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of*

moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund."

As Surrogate Witmer points out (*Matter of Security Trust Co. of Rochester, supra,* at p. 767) this type of notice is really an estoppel notice for the benefit of the trustee and had its historical origin in judicial decision notably *Matter of Union Trust Co.,* 219 N. Y. 514.

Such notice fails utterly to serve as a notice of the application for judicial settlement of the accounts of the trustee of the common fund for the reasons set out below.

First, "It only purports to advise the interested persons of what the law is and not of any pending or impending settlement proceeding therein. Since everyone is presumed to know the law, enclosing a copy of it amounts to no more than a favor without legal significance. *It constitutes notice of nothing*" (*Matter of Security Trust Co. of Rochester, supra,* at p. 767).

As Fraser voices it (34 Cornell L. Q., p. 40):

> "The notice must indicate that there is a proceeding involving certain property, the nature of the proceeding, *whose interests* are affected, and *the time and place of the hearing.*"

Since it is the law that a decree, in a contested divorce action, which "gave . . . . notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree" cannot operate as a "notice of the time and place of such further proceedings" under the due process clause, *Griffin* v. *Griffin*, 327 U. S. 220, 229, rehearing den. 328 U. S. 876, *more certainly is it the law that the notice of the first investment in a common trust fund cannot function as a notice of the settlement of an account of such common trust fund.*

The only provisions of the statute relating to the time and place of the settlement of the accounts of the trustee of the common fund are contained in subdivision 10 (Appx. A, p. 97) which reads in part:

> "10. Not less than twelve nor more than fifteen months *after the date on which a common trust fund is established, and triennially thereafter*, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county*. . . ."

A non-resident person currently interested in income, living in California for example, upon reading subdivision 10 would be informed only that *at some indefinite future time* in *either* the Supreme Court or Surrogate's Court of an *indefinite county* of New York State the trustee of the common fund would have to file an account. *To know even the approxi-*

mate time of the next account, which might be almost three years in the future, he would have to ascertain either the date of the establishment of the fund or the date on which the last account was filed. To know the county in the State he would have to discover the county of the principal office of the trust company. Under the Act none of this data is required to be included in the notice specified by subdivision 9 (Appx. A, pp. 94-5). *Even if he obtained this information by his own efforts he still would not know in which court the next account would be filed, let alone the address of such court since the selection of the court rests in the discretion of the trust company. Thus the burden of discovering this data would be shifted upon him. But, since it is true, as Judge Cardozo, speaking for an unanimous Court, states in In re Grand Boulevard and Concourse,* 212 N. Y. 538, 544, *that, even in a proceeding by the State to condemn land, "The state . . . cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention"* then, *a fortiori,* the *legislature cannot place upon the defendant in a private proceeding between individual persons "the duty of hunting out the facts for himself".* (See *Griffin* v. *Griffin, supra,* at p. 229).

Second, under the terms of subdivision 9 (Appx. A, pp. 94-5), the notice of the first investment is directed to be sent, *not to every person interested in income,* but only to "those then entitled to share in the income therefrom", that is "At the time of making the first investment". Hence none of the persons secondarily interested in the income of the forty-eight

participant *inter vivos* trusts would be entitled to this notice of the first investment. *It might well happen, under the provisions of the statute, that the primary life beneficiary would die a month after receiving such notice of the first investment and be succeeded by a secondary life beneficiary and that the participation would be successively increased over a period of thirty years during which time the secondary life beneficiary would receive no notice whatever, either of the first or of the additional investments as "no further notice of any later investment . . . need be sent . . ."*

Third, the specific direction in subdivision 12 (Appx. A, p. 98), which refers to the citation solely, that "In any such accounting proceeding the . . . citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund . . ." makes it clear that the notice of first investment was not intended to serve in any manner as a notice of the accounting.

Fourth, pursuant to the directions of the Act, *it might occur that the first investment of a particular trust would be made within a month after the establishment of the common fund; that the participation would be increased from time to time during a forty year period and that the life beneficiary would remain the same. In such a situation one notice only would have to be sent* (subd. 9, Appx. A, p. 94) *and the fourteenth account of the fund would have to be filed approximately forty years after the sending of such notice* (subd. 10, Appx. A, p. 97). *No reason-*

able person can maintain that a notice sent forty years earlier could constitute notice of the settlement of the fourteenth account taking place forty years later.

It is to be remembered that the difficulties we have been discussing exist where the trust company maintains only one common fund. If the trust company maintained several common funds as the Act permits (subd. 1, Appx. A, p. 91) one trust might have a participation in each and the burdens put upon the beneficiaries would be greatly multiplied.

We submit that it is clear beyond a reasonable doubt that the notice of the first investment required by subdivision 9 (Appx. A, pp. 94-7) does not constitute a notice of hearing and does not comply with the requirements of "due process".

XIII.

Since the Decree Herein Purports to Take Away Personal Rights of Known Non-Residents, Service Solely by a Publication in Which They Are Not Named, Without Mailing, Violates "Due Process".

Since the mode of service of the notice of hearing is affected in some degree by the nature of the judicial decree to be rendered, it appears essential to ascertain whether a decree settling the account of a common trust fund is entirely *in rem*, or wholly *quasi in rem*, or simultaneously *in personam* and *quasi in rem*.

We believe we have demonstrated that the statute provides for a decree on the accounting of a common trust fund which takes away from persons interested in income personal rights against the trustee of the 48 trusts (this brief, pp. 18-33). *To the extent that*

the decree destroys these personal rights it is a judgment in personam against the persons interested in income. Such is the exact holding of this Court in the recent case, *Estin* v. *Estin*, 334 U. S. 541, decided June 7th, 1948. This decision concerned what effect a valid Nevada divorce decree, based on the domicil of the husband but without any personal service on, or appearance by the wife, had upon a prior New York decree awarding alimony in a separation proceeding where both parties were before the Court. The husband argued that since the Nevada courts had control over the marriage *res* it necessarily had control over alimony which was an incident to the *res*. This is substantially the same contention as that made by the trustee herein in its brief to the New York Court of Appeals (pp. 15-16) in support of its position that because a court had control of the trust fund it had power to destroy the personal rights of the beneficiaries against the trustee without regard to the type of notice given to the beneficiaries. This Court rejected this contention, stating (at pp. 548-549):

> "The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done."

We mention *Estin* v. *Estin* (*supra*), solely to demonstrate that the decree settling the account of a common trust fund is, at least in part, a decree *in personam*. We believe that this caveat coupled with our earlier

concession that New York has a jurisdiction, limited as we have stated (this brief, p. 36), will serve to prevent a confusion of the issue of due notice of hearing with any question of lack of jurisdiction by reason of non-residence *per se*. The former issue is raised herein; the latter question is excluded.

It has been definitely decided by this Court in the case *Commonwealth Co.* v. *Bradford*, 297 U. S. 613, that *a decree is in personam so far as it determines the rights and liabilities inter se of the beneficiaries and trustee of a common trust fund.* Such is, in part, the precise effect of a decree settling the account of a common trust fund.

That a proceeding, and the decree thereon, in one aspect is *in rem* does not preclude its being *in personam* in another aspect under New York law. As the New York Court of Appeals has stated in speaking of a matrimonial action, *Geary* v. *Geary*, 272 N. Y. 390, 399:

> "A matrimonial action often has a dual aspect. In one aspect it is substantially a proceeding *in rem*, since its purpose is to alter the matrimonial status of the parties: in the other aspect it is a proceeding *in personam*, since its purpose is to compel the defendant to perform his obligation to furnish his wife and children with support."

Likewise, a decree on the accounting of a common trust has a two-fold aspect. In one aspect it is substantially *quasi in rem* since it determines the components of a fund; in the other aspect it is *in personam* since it either terminates (R. 189-190), or enforces personal rights of the beneficiaries against the trustee,

Commonwealth Co. v. *Bradford, supra* (see also *Parsons* v. *Lyman,* 32 Conn. 566; 18 Fed. Cases 1263, Case No. 10,780, *Matter of Buckman,* 270 N. Y. App. Div. 707, affd. 296 N. Y. 915, cert. den. 332 U. S. 763).

Since it is true that, in order to be able to create a relation between two persons characterized by an obligation on the part of one and a right on the part of the other, the Court must have power over both, it necessarily follows that, in order to be able to destroy this personal relation by relieving one individual of his obligation thereunder, the Court must have power over the person who possesses the corresponding right as well as jurisdiction of the one having the duty. Thus it must be true that a judgment which takes away a personal right from one party to the relation, by freeing the other from the corresponding obligation, is as much a judgment *in personam* as one which imposes the obligation thus creating the corresponding right. This Court has so decided in *Estin* v. *Estin* (*supra,* at 548-549), in which this Court declared:

> "The New York judgment is a property interest, created by New York in a proceeding in which both parties were present. *It imposed obligations on petitioner and granted rights to respondent.* The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. *Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations* cf. *Curry* v. *McCanless,* 307 U. S. 357. . . ."

We emphasize that in the discussion of this problem we assume, for the purposes of the argument: that the

State of New York has jurisdiction over the assets of the common fund constituting the *res;* that it also has a personal jurisdiction over certain of the non-resident individuals, interested in the income of both the common fund and the 48 *inter vivos* trusts, limited as stated before (this brief, pp. 35-37), sufficient to authorize its courts to render a judgment *in personam* against the interested individuals to the extent, only, that it is necessary for the proper administration of the trust fund *provided it requires a proper notice of hearing.*

Our position is that, despite these assumptions, *the State violates "due process" in attempting to confer upon its courts jurisdiction to render such a limited judgment in personam against known non-resident persons interested in income, when the only service of process it authorizes is a publication, particularly one in which these known persons are not required to be named* (*McDonald* v. *Mabee, supra; Webster* v. *Reid, supra; Wuchter* v. *Pizzutti, supra*).

It is well settled that even when the State has power over the defendant, either by virtue of his having been a resident who has departed from the State (*McDonald* v. *Mabee, supra*) or because of an implied consent (*Wuchter* v. *Pizzutti, supra*), *service of a notice, by publication only even if the defendant is named, or by service on an official of the State, is insufficient to give the Court jurisdiction to render a judgment in personam against a known non-resident defendant and such service violates "due process"* (*Restatement of Judgments*, sec. 32, comment f).

In *McDonald* v. *Mabee* (*supra*, 243 U. S. 90) there was involved the validity of a statute and of a judgment authorized thereunder purporting to bind per-

sonally a resident of Texas who had left the State intending not to return. *He was served in Texas after such departure, only by a publication in which he was named, pursuant to said statute.* This Court held such judgment void, stating through Justice Holmes (*supra*, at pp. 91-92):

> "And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact . . . *But it appears to us that an advertisement in a local newspaper is not sufficient to bind a person who has left a State intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.*"

Since this is the law, more certainly is it the law that "due process" is violated by a statute such as subdivision 12 *which requires service against known non-residents solely by a local publication in which they are not named.*

It is important to note that the judgment held void in the cited case was a dual one, being *quasi in rem* to foreclose a lien as well as purporting to bind the defendant personally (243 U. S. 90, at 91). This decision further buttresses our contention that a proceeding and the decree thereon can be simultaneously *quasi in rem* and *in personam* (this brief, pp. 58-9).

Wuchter v. *Pizzutti* (*supra*, 276 U. S. 13) concerned the validity as to "due process" of a state statute which authorized a judgment *in personam* against a non-resident motorist operating a motor

vehicle on the state highway, in a suit arising out of such operation, when the only mode of service prescribed was service on a state official. It appears that the defendant was actually served outside the state but this Court ruled that, since the statute did not require any service other than on the state official, the statute violated "due process". This Court held (p. 19):

> ". . . the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required *to mail the notice to the defendant, or to advise him by some written communication, so as to make it reasonably probable that he will receive actual notice.*"

This cited case again stresses the principle that the petitioner "cannot shift upon" the respondent "the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adapted to bring their pendency to his attention" (*In re Grand Boulevard and Concourse, supra,* 212 N. Y. 538, 544).

In *Webster* v. *Reid,* 52 U. S. 437, the question at issue was the validity as to "due process" of a statute of the Territory of Iowa, and of a judgment rendered pursuant thereto. The said enactment provided for suits by commissioners, who had supervised the partition of certain "Half-Breed lands" in the Territory, to recover the fees and costs of such partition against the owners of the lands. The Act further directed that "said judgment shall be a lien on said lands" (*Webster* v. *Reid, supra,* at p. 439). The only notice required by the legislation *was a local publication ad-*

dressed to "Owners of the Half-Breed Lands lying in Lee County" and the statute, as in Section 100-c (Appx. A, pp. 98-9), *specifically provided that such "shall be a sufficient designation and specification of the defendants in said suits"* (*Webster* v. *Reid, supra,* at p. 439).

This Court held the judgment and statute void for want of "due process" stating (at pp. 459-460):

> "By the Act under which the suits were instituted, no other designation of the defendants was required than 'Owners of the Half-Breed Lands lying in Lee County'. These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not attached. In this case there was no personal notice nor an attachment or other proceedings against the land until after the judgments. The judgments therefore are nullities. . . ."

Webster v. *Reid* (*supra*) was cited in *Griffin* v. *Griffin,* 327 U. S. 220, 228; rehearing denied 328 U. S. 876, as authority for the rule that a service upon known persons, whether resident or non-resident, only by a publication in which they are not named is contrary to due process, does not make such known persons parties to the proceeding and renders the judgment void as to them. This is convincing proof of the present force of this rule of law. To the same effect is *Pana* v. *Bowler,* 107 U. S. 529, *Hansberry* v. *Lee,* 311 U. S. 32, 40.

Regarding both *in rem* and *quasi in rem* proceedings, it is settled that the judgment thereon does not affect rights *in personam* and it is not necessary for the Court rendering such judgment to have jurisdiction over persons, *Hanna* v. *Stedman*, 230 N. Y. 326, 333-335. Since the Court of Appeals in this case has held that "due service of a notice pursuant to Subdivision 12 of Section 100-c of the Banking Law" is "sufficient to confer *jurisdiction over persons* interested in the income of a common trust fund" it is an essential deduction therefrom that said Court has construed said Section 100-c as establishing the accounting herein to be at least partly *in personam* (this brief, pp. 27-30). This interpretation of a New York statute to the effect that the present proceeding is partly *in personam* is binding on this Court, *Kovacs* v. *Cooper*, —— U. S. ——, 93 L. ed. 379, 385, 69 S. Ct. 448; *Terminiello* v. *Chicago*, —— U. S. ——, 93 L. ed. 865, 867, 69 S. Ct. 894. Of course, the New York decision *as to the effect under the Federal Constitution* of such interpretation is not binding on this Court.

All these cases compel us to conclude that, whether the proceeding for the settlement of the account of a common trust fund be considered as wholly *in rem* (this brief, pp. 46-8) or wholly *quasi in rem* (this brief, pp. 48-9) or partly *quasi in rem* and partly *in personam* (this brief, pp. 58-61) the notice of hearing required by Section 100-c of the Banking Law is contrary to "due process".

In fact such proceeding is partly *quasi in rem* and partly *in personam* (this brief, pp. 58-61). The special guardian-appellee granted in his brief to the Court of Appeals (p. 7) that the notice was insuffi-

cient to confer personal jurisdiction, writing "*No one claims that the manner for gaining jurisdiction here is calculated to secure personal jurisdiction.*"

XIV.

Common Trust Fund Legislation in Other States.

As a result of the comparative study, (made in Appx. C, pp. 105-109), of common trust fund legislation in other states, one fact stands out as vividly as a fork of jagged lightning against a night sky. It is this: *that not a single one of the thirty-one other jurisdictions in the United States, which have common trust fund statutes, has a provision therein providing for service on known interested persons solely by publication of a process in which such individuals are not named; the New York Act is unique in this respect.* Such fact becomes one of added significance when it is remembered that New York legislation in a new field frequently serves as a model for legislation in other States, and when it is recalled that the legislatures in at least twenty-seven of these other jurisdictions had a period ranging from four to twelve years after the enactment of Section 100-c in 1937 within which to study our statute before passing their own common trust fund Acts.

In view of the decisions cited previously as to the constitutional requirements of notice and hearing, it is a fair inference that these other legislatures studied and rejected as contrary to "due process" the type of notice of the account authorized by Section 100-c of our Banking Law. Since it is true: first, that as of April 1946 there were thirty-six institutions in sixteen states operating common trust funds (*George C. Bar-*

clay, 25 Trust Bulletin, p. 12, April, 1946); second, that as of September 1945, common trust funds had been established, among others, in Massachusetts (*Barclay, supra*) which requires the account of the common trust fund to be settled once a year and in the same manner as the accounts of other fiduciaries (Mass. G. Laws, c. 203A, sec. 5), it necessarily follows that any argument is unsound which maintains that the only workable provisions for notice of the accounting are those contained in Section 100-c of the New York Banking Law (R. 166). Incidentally, the author of the cited article is the same person who was one of appellees' witnesses below (R. 51-52).

XV.

Some Results of Holding That the Statute Complies With the Constitutional Requirements of Due Process of Law.

It has been said and it is true, that from the aspect of trust administration a common trust fund has the virtue of constituting a vehicle of diversified investment for small trusts (*Matter of Bank of New York*, 189 Misc. 459, and a recent national survey discloses that 73.5 per centum of all trusts in the care of trust institutions have an average annual income of $788.00 (26 Trust Bulletin 2, May, 1947) which would indicate an average principal of the value of approximately $27,000.00. Since in New York the permissible amount of investment in a common fund from any one trust is now $50,000.00 (*Matter of Bank of New York, supra*, at p. 467, subd. 1, sec. 100-c, Appx. A, p. 91, R. 63), it is readily apparent that the majority of, if not all, small trusts will be wholly invested in common

funds where such funds exist and where the trusts give the fiduciary discretion as to investments.

We believe that it has been demonstrated (this brief, pp. 43-5) that the provision in subdivision 12 for notice of hearing "is not calculated to notify. In fact, it appears to be a colorable and illusory provision that seems to provide for notice and yet is calculated not to give notice . . ." (*Matter of Security Trust Co. of Rochester*, 189 Misc. 748, 770). Justice Van Voorhis puts it even more strongly when he declares (R. 163, fol. 249):

> ". . . but it appears affirmatively on the face of this statute *that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as would have been likely to reach those beneficiaries who are currently interested in the income, . . .*"

Further, it has been shown that the decree on the common fund is binding, as to "all questions respecting the management of the fund" (R. 112, fol. 167), on all persons interested in the common fund and in the underlying estates trusts or funds (this brief, pp. 23-33) and that the issues as to which such decree is binding are

> ". . . whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof" (*Matter of Bank of New York*, *supra*, at p. 470).

It is evident that such issues encompass the entire field of the administration of a trust; also, that *the effect of a prior decree settling the account of a common fund is to foreclose the Court administering the underlying trust from considering any problem pertaining to its administration* except the rights of the trustee to invest in the common fund and to commissions.

From the foregoing considerations it necessarily follows that *the proceeding on the accounting for the common fund is the only proceeding in which persons interested in the income of small trusts, which are wholly invested in common funds, can use their right to enforce their participant trust. This is conclusively demonstrated by the following language of subdivision 15* (Appx. A, p. 101):

> "A . . . decree judicially settling the account of proceedings of a trust company . . . with respect of any . . . trust . . . the whole or any part of which shall have been invested in a common trust fund shall not preclude any party interested therein, upon the next judicial settlement of the account . . . of said trust company with respect to such common trust fund, from . . . objecting to any action . . . taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously . . . settled account . . . with respect to such common trust fund. . . ."

But if the statute which authorizes such proceeding does not require notice of the hearing to be given to such persons, or, if it attempts to "make that a notice which is no notice at all," Martin v. Central Vt. R. R. Co., 50 Hun 347, 350, *then such statute becomes a de-*

vice to destroy those property rights, guaranteed by our Federal Constitution, of the very persons whom the Act purports to protect, namely, those rights of persons interested in small trusts. We respectfully submit that such will be the necessary result of upholding the constitutionality of the notice of hearing authorized by subdivision 12 of said Section 100-*c*.

We know that a decision which denied to income beneficiaries their right to enforce their participant trust would shock the conscience of this Court. But such is the effect of the judgment of the New York Court of Appeals herein, for as Justice Van Voorhis emphasizes (R. 167, fol. 254):

> "The opportunity to exercise that right is reduced by this statute to the vanishing point."

XVI.

Result of Holding the Notice of Hearing Unconstitutional.

Despite considerable research and meditation, we have been unable to discover any adverse effect upon a socially desirable aim which would result from a ruling that the questioned provision of the Act nullifies "due process". In this respect, the only contention made by the trustee herein in its brief to the Appellate Division (pp. 11-12) was that the common trust fund would be unworkable if the said provision of the statute was not retained. Justice Van Voorhis explodes this contention when he remarks (R. 166):

> "It is idle to assert that without this exact provision of section 100-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in

> the statutes of the other 28 states having legislation upon this subject. The alternative is not between this statute or no statute at all."

A ruling by this Court that the notice of hearing authorized by subdivision 12 does not comply with due process of law will result merely in the proper amendment of the statute to incorporate therein a constitutional provision as to notice; for example, one such as that contained in section 2 of the Uniform Common Trust Fund Act. As Justice Van Voorhis declares (R. 167, fol. 255):

> "This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should be struck down without invalidating the rest of the section."

The issue herein presents no dilemma which requires either the abandonment of the genuine benefits of the common trust fund or a ruling that the existing provision for notice of hearing is constitutional, although it obviously violates due process of law. The real alternatives are: on one hand, the preservation of the undoubted advantages of the common fund and of the property rights of beneficiaries of small trusts in accordance with the basic aim of the Act by a decision that the notice authorized is unconstitutional; on the other, the subversion of the fundamental purpose of the statute, the destruction of the property rights of such beneficiaries and the emasculation of the constitutional guaranty by a holding that the notice of hearing, presently authorized, complies with "due process".

XVII.

Analysis of the Opinion of the Surrogate.

Thoughtful reflection upon the Surrogate's opinion (R. 105-120) leads us to believe that the following considerations collectively form the foundation upon which he based his decision on this constitutional question.

(i) "It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of the account of the fiduciary and the distribution of the assets are proceedings *in rem*. . . ." (R. 111). But concerning *in rem* proceedings for the settlement of the account of an executor it has been held that "general notice to interested parties by publication is sufficient under the constitution" (R. 112). [The implication is that notice by publication alone is sufficient in the present proceeding.]

In answer to this we submit the following:

First, fairly analyzed the reasoning of the learned Surrogate runs thus:

(a) If a proceeding be *in rem* it must be wholly *in rem* and cannot be partly *in personam*.

(b) *Some* accounting proceedings, namely some of those relating to decedents' estates have been held to be *in rem*.

(c) Therefore *all* accounting proceedings, including one for a common trust fund, must be entirely *in rem*.

(d) In *some in rem* accounting proceedings, namely in some of those relating to decedents' estates, notice only by publication has been held constitutional.

(e) Therefore notice by publication is constitutional on a common trust fund account.

The major premise of the first syllogism is false, *Geary* v. *Geary, supra; Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 353; *Riley* v. *N. Y. Trust Co.,* 315 U. S. 343, 353. The conclusion of the first syllogism, which also constitutes the major premise of the second, is false not only because it doesn't follow from the premises stated, but also because the first major premise is untrue. The conclusion of the second syllogism is likewise false for similar causes.

Second, apart from logic, the alleged rule of law embodied therein relates solely to the descent and distribution of decedents' estates and, even if it were correct, is not applicable to common trust funds, since under the Act the common fund can consist, either *wholly* or in part, of participations from *inter vivos* trusts (subd. 1, Appx. A, p. 91, R. 108). In the present proceeding the fund actually is composed of participations from one hundred and thirteen trusts of which fifty-six are *inter vivos* trusts (R. 106). If the learned Surrogate's comments be regarded as an argument from analogy, we believe the statement by the New York Court of Appeals in *Hutchison* v. *Ross,* 262 N. Y. 381, 391-392, is sufficient to demonstrate the unsoundness of applying any analogy, drawn from the supposed nature of a proceeding for the settlement of the account of an executor, to the settlement of the account of a common trust fund. The nature and effect of a decree settling the account of a common trust fund can only be determined by an analysis of the relevant provisions of said Section 100-c.

Third, the said argument of the learned Surrogate does not even touch upon the question, present on the instant appeal, of whether a statute is constitutional which directs that known persons shall be bound by a publication *in which they are not named, in a suit between private persons.* He has not cited any opinion by any Court holding such legislation to be constitutional (this brief, pp. 79-86). On the contrary we have discussed decisions of this Court holding that such persons cannot be so bound whether the action be entirely *in rem*, or entirely *quasi in rem* or partly *quasi in rem* and partly *in personam* (this brief, pp. 46-67).

(ii) Another claim relied upon by the Surrogate below is that the notice of the first investment operates as a notice of the hearing (R. 113). It is our opinion that this contention has previously been demonstrated to be unsound (this brief, pp. 53-8).

(iii) A third factor influencing the learned Surrogate's decision is found in the requirements of an annual audit, of notice to the persons currently interested in income of their right to obtain a copy of such audit and in the direction that the accounting records of the common fund shall be open for inspection quarterly for a three-day period (R. 114).

Such audit, however, is to be made *by auditors responsible, not to the Banking Board, but to the board of directors of the common trustee* (R. 73). The notice that a copy of the audit is obtainable is less than the annual statement which a fiduciary of an underlying trust must send to the current income beneficiaries before he can obtain annual principal and income commissions (S. C. A. sec. 285-a, subd.

4, Book 13, Gilbert-Bliss, 1949 Cum. Supp. pp. 156-157). The Act (Appx. A, pp. 94-7) does not require such notice to be sent to the persons secondarily interested in income. Aside from this, the opinion of the Surrogate does not disclose how such requirements can function as a notice of the settlement of the account of the common fund (see *Griffin* v. *Griffin*, 327 U. S. 220, 229). The annual statement referred to has never been deemed to be a substitute for a citation on the judicial settlement of the account of an individual trust, *Matter of Ryan*, 291 N. Y. 376. The principle implicit in this position of the learned Surrogate is that "the burden of ascertaining that the proceedings are in motion" can be shifted to the persons interested in income. Such principle was repudiated expressly by Judge Cardozo speaking for the unanimous New York Court of Appeals in the decision, *In re Grand Boulevard and Concourse*, 212 N. Y. 538, 544.

(iv) A fourth consideration affecting the ruling of the Surrogate is the belief that the ascertainment of the names and addresses of, and service by mail upon, *all* persons interested in the fund, *including principal*, "would involve a disproportionate expense" (R. 117). Justice Van Voorhis shatters this dialectic when he observes (R. 165):

> "The circumstance that it may be impracticable to give effectual notice to *all* interested parties is hardly a reason for not giving such notice to *any*."

This argument of the learned Surrogate also is irrelevant because our representation is limited to persons interested in income whose number in this pro-

ceeding cannot exceed 315 (this brief, p. 40) and a mailed notice to each of them would have cost $9.45. Their names and addresses are either on the books of the Trust Company as is the case if they are currently interested in income, or readily ascertainable, as is true if they are secondarily interested in income (this brief, pp. 39-40).

(v) Finally the Surrogate concludes (R. 120):

> ". . . The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and competent public officials."

Apparently the learned Surrogate is referring to the regulation under the statute by the Banking Board (R. 114-115), to the statutory representation by special guardians (R. 114) and to judicial supervision (R. 115, fol. 171).

As to *discretionary* common trust funds, apart from the formulation of regulations which must comply with the statute and aside from the approval of the plan for the fund, which also must conform to the Act, the only discernible supervision over the actual operation of the fund exercised by the Banking Board consists of two things. One is the requirement of filing with the Board a copy of the annual audit of the fund, *which is made by auditors responsible, not to it, but to the board of directors of the common trustee* (R. 73). The other is the prohibition against investing all or the major part of the assets of such fund in mortgages (R. 70-71). The much greater and more active general supervision exercised by the Banking Department of this State

over banks has never been considered to be an adequate substitute for notice of hearing in suits between the banks and individuals. Justice Van Voorhis demolishes this argument of the learned Surrogate when he writes (R. 166-167):

> "Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to determine that the securities in the fund (or proceeds of sale thereof) are on hand, and that those securities which are required to be 'legals' are actually such. 'The superintendent shall have no other duty or responsibility in respect to the *administration* of common trust funds' (100-c, subd. 13)."

With respect to the statutory representation of adult and competent persons by Special Guardians, we believe we have already shown that the substitution of such representation for a constitutional notice of hearing is tantamount to a denial of the right to be heard (this brief, pp. 52-3).

Relating to judicial supervision, if the surrogate or particular judge of the Supreme Court be regarded as having under the Act any duties of investigation into, or of administrative supervision over, the common fund in addition to the usual judicial process then the statute is being construed to constitute the surrogate or particular judge as a one-man S. E. C. with the duties and powers of prosecutor, administrator and judge. While we believe that the Act cannot be so interpreted (and no New York case is cited supporting such construction), even if such

interpretation were correct, it would not be a sufficient basis for dispensing with the notice required by due process (R. 167).

We submit that the basic postulate implicit in the Surrogate's opinion is that the legislature, for the benefit of private banking corporations in litigation between private persons, can "make that a notice which is no notice at all" (Martin v. Central Vt. R. R. Co., 50 Hun 347, 350), thus eliminating the notice required by the Federal Constitution, provided the legislature substitutes some other notices, not required by the Constitution, which it deems satisfactory. We further submit that such a postulate is palpably subversive of the constitutional requirements of procedural due process of law, particularly in the present case where there is no emergency and where the police powers of the State are not invoked.

Analysis of Authorities Cited by Surrogate.

As authorities in connection with his ruling on "due process", the learned Surrogate cites seventeen decisions and makes two references to the Restatement of Judgments (R. 111). To examine each of these in detail would unduly lengthen this brief, but it is necessary to point out briefly the various circumstances in each case which makes each of them valueless as an authority for the type of notice authorized by Section 100-c.

(1) *Grannis v. Ordean, supra.*

Earlier in this brief (pp. 48-9) sufficient analysis has been made of this ruling to demonstrate that instead of supporting the learned Surrogate's opinion, it is an authority for appellant's position.

(2) *Ballard* v. *Hunter*, 204 U. S. 241;
Wick v. *Chelan Electric Co.*, 280 U. S. 108;
Huling v. *Kaw Valley Ry.*, 130 U. S. 559;
North Laramie Land Co. v. *Hoffman*, 268 U. S. 276;
City of N. Y. v. *Wright*, 243 N. Y. 80;
Christianson v. *King Co.*, 239 U. S. 356;
Securities Savings Bank v. *California*, 263 U. S. 282;
Campbell v. *Evans*, 45 N. Y. 356;
Lamb v. *Connolly*, 122 N. Y. 531;
State of N. Y. v. *Gebhardt*, 151 Fed. 2d 802.

(a) Involved in these decisions were the validity of statutes regulating *suits to enforce a governmental power. For example are actions involving the collection of taxes upon land within the State* (*Ballard* v. *Hunter*, *supra*, at p. 254; *Lamb* v. *Connolly*, *supra*, at p. 532-533) and statutes regulating suits *to condemn land within the State for public purposes* (*Wick* v. *Chelan Electric Co.*, *supra*, at 109; *Huling* v. *Kaw Valley Ry.*, *supra*, at 559-560, 564; *North Laramie Land Co.* v. *Hoffman*, *supra*, at 282), also *to register land titles under the Torrens Law* (*City of New York* v. *Wright*, *supra*, at 84); also *suits* to control escheat (of land within the State, *Christianson* v. *King Co.*, *supra*; of personal property having a situs within the State, *Security Savings Bank* v. *California*, *supra*), to prohibit the running at large of cattle in the streets (*Campbell* v. *Evans*, *supra*), to give priority to grade-crossing elimination claims of the State (*State of New York* v. *Gebhardt*, *supra*, at 804-805). As to proceedings affecting land within the State this Court has expressed in *North Laramie Land Co.* v. *Hoffman* (*supra*, at 283) the

reason for permitting the process used in this type of proceeding, thus:

> "Owners of *real estate* may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes *providing for taxation or condemnation of land* may adopt a procedure summary in character and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation."

In the cited cases it was essential, on the one hand, to protect the right of the sovereign in the necessary exercise of its power, *Bells Gap R. R.* v. *Penna.*, 134 U. S. 232, 239; *Castillo* v. *McConnico*, 168 U. S. 674, 680; 34 Cornell L. Q. 29, 41; on the other, the nature of the property affected, and the type of notice used were such that a non-resident owner would be likely to be notified of a local publication of process, particularly in the case of real property by his local agent, *and it is usual for non-resident owners of realty to have local agents.*

No such considerations exist in the common trust fund situation. On the contrary, Section 100-c (Appx. A, p. 91) concerns *a proceeding by a private banking corporation, not exercising any governmental power but acting as trustee, relating to a trust fund*

consisting of personalty in which the beneficiaries lack "any ownership in any particular asset or investment" (subd. 2, this brief pp. 7-8) *and concerning which it is not usual to have a local agent.*

(b) The statutes which were the subject of the decisions in *Ballard* v. *Hunter* (*supra*, at 254) and in *Wick* v. *Chelan Electric Co.* (*supra*, and see 145 Wash. 129 at 133) *required personal service of the process on residents.* Section 100-c (Appx. A, subd. 12, p. 98) directs *service by a publication "addressed generally without naming them" to known persons, residents and non-residents alike whose addresses are known* (this brief, pp. 39-40).

(c) The statute in *City of New York* v. *Wright* (*supra*, at 84) required notice by registered mail to all known parties: Section 100-c does not (Appx. A, subd. 12, p. 98).

(d) In *Security Savings Bank* v. *California* (*supra*) there existed the following additional facts which completely distinguish it from the common trust fund situation:

(i) The statute in the cited case required the naming of the depositors in the notice of hearing (*Security Savings Bank* v. *California, supra*, at 283, note 1; *California Code of Civil Procedure*, Sec. 1272); Section 100-c forbids the naming of known interested persons in the citation (Appx. A, subd. 12, p. 98).

(ii) In the cited case the addresses of the depositors were not known; in the common trust fund situation the current addresses of all persons currently interested in income are on the books of the Trust Company (this brief, pp. 39-40).

(iii) In the decision under examination it was so evident that the addresses of the depositors could not be discovered by reasonable diligence, that this Court, speaking of the statute's failure to require an affidavit of diligence stated (263 U. S. 282 at 288-289):

> "But here the general facts which underlie the legislation establish the futility of such a requirement.
>
> ". . . . The statute applies only to deposits in the name of a person who is not known to the president or managing officer of the bank to be alive, whose account has not been added to or drawn upon for twenty years, and who has not filed within that time any notice or claim giving his then residence. The legislature evidently assumed that it would be impossible to serve such depositors personally."

In the circumstances of the common trust fund the names and addresses of the persons currently interested in income are always known to the Trust Company and the names and addresses of the persons secondarily entitled to income, if unknown, are readily discoverable by the exercise of reasonable diligence (this brief, pp. 39-40).

(3) *American Land Co.* v. *Zeiss*, 219 U. S. 47.

(a) This ruling concerned the extraordinary situation existing in California after the great earthquake and fire as a result of which the public records as to titles to land in and around San Francisco were largely destroyed. Even in this unique circumstance *the statute in question, unlike Section 100-c, necessitated the naming in the publication of all persons who*

were known or who could be ascertained with due diligence and service either personally or by mail upon them (219 U. S. 47, 65; *Title and Document Restoration Co.* v. *Kerrigan*, 150 Cal. 289).

(b) The statute in the cited decision related to land within the State (219 U. S. 47 at 59); Section 100-c does not (Appx. A, subd. 3, pp. 92-3).

(4) *Goodrich* v. *Ferris*, 214 U. S. 71.

(a) This case concerned an attempt 7 years later to set aside decrees of distribution of a California probate court and *the only question decided by this Court was whether the 10-day period between the commencement of the notice and the return day was so short as to violate the Federal constitutional requirements of "due process"* (214 U. S. 71 at 81; see also *Security Savings Bank* v. *California*, 263 U. S. 282 at 288). The instant appeal presents questions regarding notice of hearing entirely different from one pertaining to the length of time elapsing between the commencement of the notice and the return day of the process (this brief, p. 2).

(b) The statute involved in the cited case (*Civ. Cod. of Cal.*, Sec. 1633) gave the probate court discretion to require further notice. Section 100-c does not confer such discretion upon the Court (this brief, p. 44).

(c) The cited decision related solely to the probate and distribution of the estate of the decedent, which is a subject peculiarly within the jurisdiction of the State courts, not because such a proceeding is wholly *in rem* but by reason of the constitutional distribution of judicial powers between the States and the Federal Government (*Markham* v. *Allen*, 326 U. S.

490, 494). Decisions relating to descent and distribution of the estate of a decedent are *sui generis* since there is no federal constitutional guaranty of the preservation of the expectancy of succession to property of a decedent, whether by intestacy or by testament, *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562; *Hamilton* v. *Brown*, 161 U. S. 256, 275. Hence they are not apposite to previously vested rights constituting property, created by *inter vivos* trusts such as are included in this common trust fund, which property is protected by the Fourteenth Amendment.

(d) It does not appear that the California statute dispensed with the naming of known persons in the notice: Section 100-c specifically so dispenses (subd. 12, Appx. A, p. 98).

(5) *Matter of Empire City Bank*, 18 N. Y. 199.

This decision involved a statute regulating the disposition of the affairs of an insolvent corporation, including proceedings to enforce personal liability against the stockholders (18 N. Y. at 199).

(a) The statute in the cited case required either the personal service or service at the residence upon all stockholders resident in the county and *service upon all other stockholders by advertisement in which known persons were required to be named* (Ch. 226, N. Y. L. 1849, secs. 15, 16 and 17): there is no such requirement in Section 100-c (Appx. A, subd. 12, p. 98).

(b) The type of notice required by the statute in the cited case was such that it was reasonably probable that the stockholders would be notified for, as the Court stated,

> " . . . *Every one in any way connected with a bank would be likely to hear of a fact so notori-*

ous as that it had stopped payment, and that its affairs had passed into the hands of a receiver. . . . The probability of actual knowledge would be equally great in respect to the creditors; as the holders of the liabilities of a bank are usually among the most likely to know that it has failed" (18 N. Y. at 216-217).

In the common trust fund situation the citation is not reasonably calculated to notify anybody (this brief, pp. 43-5).

(6) *Everett* v. *Wing*, 103 Vt. 488;
Donnell v. *Goss*, 269 Mass. 214;
Roseman v. *Fidelity & Deposit Co. of Md.* 154 Misc. 320.

(a) The first two cases related solely to proceedings for the probate of a will and the comments made in item (c) concerning *Goodrich* v. *Ferris* (*supra*) dispose of them. (See also *Culbertson* v. *Whitbeck Co.*, 127 U. S. 326, 333.) The third is an opinion of the City Court of New York City. The comments made in items (b), (c), and (d) relating to *Goodrich* v. *Ferris* (*supra*) distinguish this last opinion (this brief, pp. 84-5).

In short, either by reason of the subject matter, or of the circumstances of the case, or of the requirements of the statute involved, not a single one of the decisions cited by the learned Surrogate constitutes a precedent for the service of process in the manner authorized by said Section 100-c.

POINT THIRD.

This Court has jurisdiction of this appeal.

I.

We believe that our prior Jurisdictional Statement together with the Summary Statement of Case in this brief (pp. 3-12) clearly demonstrate that this is an appeal from a final judgment of the highest Court of New York State in which a decision in such cause could be had, which involves a justiciable case, and in which there was and is drawn in question the validity of a statute of said State on the ground of its being repugnant to the Federal Constitution and that said decision of said Court is in favor of the validity of said statute.

That the judgment appealed from rests solely on a federal ground and that a substantial federal question is involved may not be so clearly developed in said Jurisdictional Statement.

II.

In view of the manner in which the issues have been formulated in this proceeding, it would appear that the only point which could give rise to a belief that the judgment of the New York Court of Appeals rests on an adequate non-federal ground, concerns the effect of said Section 100-c upon property of the persons interested in the income of this Discretionary Common Trust Fund.

Apart from any prohibition in the Federal Constitution, *Griffin* v. *Griffin*, *supra*, p. 231, the question of

the intended effect of said Section 100-c upon the property of said persons, so interested in income, is a question of statutory construction by the New York Courts. If an interpretation of the statute has been made by the New York Court of Appeals, it is binding as a matter of statutory construction upon this Court, *Kovacs* v. *Cooper*, —— U. S. ——; 93 L. Ed. 379, 385; *Terminiello* v. *Chicago*, —— U. S. ——, 93 L. Ed. 865, 867.

We believe that in this brief (pp. 23-33) we have demonstrated that the New York Court of Appeals, particularly in this proceeding, has explicitly interpreted subdivision 14 of said Section 100-c as being enacted for the purpose, and as having the effect, of depriving the persons so interested in income of property, which vested in them prior to the effective date of said Section 100-c. Consequently there is no basis for asserting that said judgment of said Court of Appeals rests on an adequate non-federal ground, to wit, a construction by the New York Courts that said Section 100-c was not intended to have, and from the viewpoint of statutory interpretation did not have, the effect of depriving said persons interested in income of property.

If this Court is of the opinion that it is a matter of doubt as to what construction has been placed upon said Section 100-c by the said Court of Appeals then this Court can vacate the judgment of said Court of Appeals for further proceedings, *Minnesota* v. *National Tea Co.*, 309 U. S. 551, or it can grant a continuance to allow said Court of Appeals to clarify its action, *Herb* v. *Pitcairn*, 324 U. S. 117; *Loftus* v. *Illinois*, 334 U. S. 804.

III.

As to the existence of a substantial federal question we consider that Points First and Second of this brief (pp. 18-86) demonstrate the very substantial nature of the federal question raised.

In this brief (pp. 67-8) we have pointed out that the provisions of the New York Act for notice of hearing are unique among the thirty-one jurisdictions having common trust fund legislation. The issue is national in scope for if the notice of hearing, which is attacked herein, is not nullified by a decision on the merits it is a reasonable forecast that a majority of the 31 other jurisdictions having common trust fund acts will adopt such notice. (Am. Bankers Assoc. Handbook of Common Trust Funds, pp. 47-8). Further we have shown that the decision in this case will affect beneficiaries of *inter vivos* trusts not only in New York but throughout the United States (this brief, pp. 68-70). Finally, we hope we have made apparent that the people chiefly to be affected by the decision in this cause are the persons most in need of the protection of the Federal Constitution and of this Court.

CONCLUSION.

Since Section 100-c of the New York Banking Law deprives the persons interested in the income of this Common Trust Fund of property without due process of law, the judgment appealed from should be reversed.

Respectfully submitted,

KENNETH J. MULLANE,
Counsel for Appellant,
350 Fifth Avenue,
New York 1, N. Y.

Dated, January 24, 1950.

APPENDIX A.

Sec. 100-c. Common trust funds.

1. For the purpose of investment and reinvestment of moneys received and held by any trust company as executor, administrator, guardian, personal or testamentary trustee, or committee, such trust company, upon receiving permission of the banking board so to do, may establish and maintain one or more common trust funds pursuant to such rules and regulations as may be promulgated by the banking board pursuant to law. In any case where the instrument or the order, decree or judgment under which such moneys are held does not forbid, such trust company either alone or in conjunction with one or more other persons acting with it in any fiduciary capacity, whether such fiduciary capacity arose or was created before or after this act takes effect, may invest and reinvest such moneys or any part thereof received and held by it alone in any fiduciary capacity or by it and such other person or persons in any fiduciary capacity by adding the same to any such common trust fund or funds and by apportioning shares or interest therein to itself or to itself in conjunction with one or more such other persons, in such fiduciary capacity, showing upon its records at all times every such share or interest in such fund or funds; and also may from time to time withdraw from such fund or funds any such share or interest in whole or in part. The net aggregate amount of moneys of any estate, trust or fund invested in any common trust fund or funds shall not at any time exceed twenty-five thousand dollars or such lesser sum as

may be fixed as the maximum amount permitted by such rules and regulations as may be promulgated by the banking board: provided, that if the board of governors of the federal reserve system shall authorize such investment in a net aggregate amount in excess of twenty-five thousand dollars in the case of common trust funds subject to regulation by such board of governors, the banking board may by regulation authorize such investment to a net aggregate amount exceeding twenty-five thousand dollars but not exceeding the net aggregate amount which may be authorized by the said board of governors or the net aggregate amount of fifty thousand dollars whichever is the lower. No estate, trust or fund shall be permitted to invest in a common trust fund when in contravention of the law of the state or country whose laws govern the administration of such estate, trust or fund. Nothing contained herein shall permit investment in a common trust fund of any trust held by a trust company either alone or with one or more other persons as trustee under any trust instrument wherein at any time the power to revest in the grantor title to any part of the corpus of said trust is vested: (1) in the grantor, either alone or in conjunction with any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or (2) in any person, other than the trustee or trustees, not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom.

3. Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund. A trust company maintaining a

legal common trust fund may invest therein the moneys of any estate, trust or fund which is eligible for investment in any common trust fund pursuant to sub-division one of this section. A trust company maintaining a discretionary common trust fund may invest therein the moneys of any estate, trust or fund where the instrument or order of court under which such estate, trust or fund is held shall authorize the investment of moneys of said estate, trust or fund in any of the following: (a) in a discretionary common trust fund; (b) in such investments as the fiduciary thereof may select in the discretion of such fiduciary; (c) generally in investments other than those in which trustees are by law authorized to invest trust funds. Except for uninvested cash balances awaiting investment or kept for the purpose of meeting cash requirements legal common trust funds shall be invested solely in the same kind of securities as those in which savings banks in this state are authorized to invest by subdivisions one, two, three, four, five, seven, ten, eleven, twelve, thirteen, fourteen, fifteen and nineteen of section two hundred thirty-five of the banking law as such section existed upon the first day of January, nineteen hundred forty-three provided that if any investment authorized by any of said subdivisions of said section two hundred thirty-five as the same existed on such date shall cease to be authorized for investment by savings banks any such investment shall thereafter be ineligible as an investment for such common trust funds. A trust company maintaining a discretionary common trust fund may invest the same in such investments as it may select in its discretion.

4. The assets of a common trust fund or funds shall be kept separate and apart from the assets of

such trust company, except that any moneys of such fund awaiting investment or distribution may be held temporarily by or on deposit with such trust company. A trust company shall not invest any of its own funds in such a common trust fund nor shall any trust company purchase for such common trust fund any securities from itself or any affiliate. The term "affiliate" shall include any of the following: (a) any corporation of which a bank or trust company directly or indirectly owns or controls either a majority of the voting shares or more than fifty per centum of the number of shares voted for the election of its directors at the last preceding election, or controls in any manner the election of a majority of its directors; (b) any corporation described in paragraphs (b), (c), (d), or (e), of subdivision nine of section one hundred three of this chapter as it existed on January first, nineteen hundred forty-three. No investment shall be made for any common trust fund in the securities of any corporation, association, business trust, or similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities. A common trust fund shall not be deemed a separate trust fund on which commissions or other compensation is allowable and no trust company maintaining such a fund shall make any charge against such fund for the management thereof.

9. At the time of making the first investment of any estate, trust or fund in a common trust fund the trust company maintaining such common trust fund shall send a notice to each person of full age

and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice. Such notice shall apprise such person that moneys of such estate, trust or fund have been invested in such common trust fund and that from time to time additional moneys of such estate, trust or fund may be invested in such common trust fund without further notice. No further notice of any later investment of additional moneys of such estate, trust or fund in such common trust fund need be sent to any person to whom the notice of an earlier investment therein shall have been sent unless at the date of such later investment all prior investment of moneys of said estate, trust or fund in such common trust fund shall have been withdrawn in full. There shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and of the judicial settlement of the accounts of such trust company for such common trust fund. To give such notice it shall be sufficient to deposit a copy thereof in a post office or in any mail box regularly maintained by the government of the United States, properly enclosed in a postpaid wrapper addressed to such person at the last post office address furnished by such person to the trust company or if no such address has been so furnished then to the last post office address, if any, known to said trust company. The affidavit of the person mailing such notice shall

constitute prima facie proof of the mailing thereof and the affidavit of an officer of the trust company in charge of the estate, trust or fund at the time of the sending of such notice concerning the names of the persons then known to the trust company to be or to claim to be included in the class or classes above mentioned and of the last post office address of each such person, if any, so furnished or known to the trust company shall be prima facie proof of the facts therein set forth. Failure to mail such notice shall not render invalid any investment in such common trust fund. The decree entered in any proceeding instituted for the judicial settlement of an account of the trust company in respect of such common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice but to whom such notice was not sent unless notice of all investments made prior thereto by the estate, trust or fund in which such person is interested shall have been sent to such person at least thirty days prior to the entry of such decree or, if such notice is sent less than thirty days prior to the entry of such decree, unless such person shall fail within sixty days after the mailing of such notice to him to apply to vacate the said decree as to him. If any such notice be sent after the institution of a proceeding for the judicial settlement of the account of such trust company with respect to such common trust fund, such notice shall also state the date of each investment of the moneys of the estate, trust or fund in which the person so notified is interested and shall state that such proceeding is pending and the name of the court in which it is pending; or if sent after the entry of the decree in such proceeding it shall state the date of each such in-

vestment and shall state that such decree has been entered and the date and place of such entry.

10. Not less than twelve nor more than fifteen months after the date on which a common trust fund is established, and triennially thereafter, each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof either in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or in the office of the surrogate of such county and shall within five days thereafter furnish the superintendent with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial settlement in the supreme court if the account is filed in the office of a clerk of that court or in the surrogate's court if the account is filed in the office of the surrogate.

11. Such petition shall set forth (a) the name and address of the petitioner; (b) the date on which such common trust fund was established; (c) the name or designation, if any, by which it is known; (d) the date of the judicial settlement of the next prior account filed, if any, relating to such common trust fund, and (e) a list of all the participating estates, trusts or funds any part of which shall have been invested in such common trust fund unless such investment shall have been wholly withdrawn therefrom prior to the period covered by such account and such withdrawal shall have been set forth in a prior account. In the case of any such estate, trust or fund, in respect of which another or others are acting jointly with the trust company in a fiduciary

capacity, the name of such other or others shall be stated in such list. In such list the participating estates, trusts or funds shall be adequately described by stating: in the case of an investment in behalf of a decedent's estate, the name of the decedent; in the case of an investment in behalf of an infant, the name of the infant; in the case of an investment in behalf of an incompetent, the name of the incompetent; in the case of an investment in behalf of a testamentary trust, the name of the decedent under whose will such trust was established and if there be more than one trust under such will, the number of the paragraph thereof establishing such trust or other appropriate identification; in the case of an investment in behalf of any other trust, the name of the grantor, donor, trustor or creator of the trust and the date of the instrument creating or defining such trust; in the case of every other investment in behalf of any other fund, such description thereof as will reasonably identify the same.

12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity

with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney.

13. The superintendent shall cause an examination to be made of the investments acquired or held by the

trust company for such common trust fund during the period covered by such account and, on or before the return date of the citation or notice, shall certify in writing to the court in which the accounting proceeding is pending whether the investments reported in such account as on hand or the proceeds of any of those liquidated since the date of such account or reinvestments of any such proceeds were actually held by the trust company at the date of such examination. In the case of a legal common trust fund he shall also certify (a) whether in his judgment each of the investments acquired by the trust company and set forth in such account was, when so acquired, an investment eligible for legal common trust funds as prescribed in this section, and (b) whether in his judgment any investment held by the trust company at any time during the period covered by such account ceased to be an investment so eligible for legal common trust funds and, if so, when it so became ineligible. The superintendent shall have no other duty or responsibility in respect of the administration of common trust funds. The special guardians and attorneys appointed by the court as hereinbefore provided may accept such certificate as proof of the eligibility or ineligibility for legal common trust funds of any investment set forth in such account. The facts stated in such certificate shall be presumptively established thereby. The accounting trust company shall pay to the superintendent his reasonable expenses incurred in making such examination and certificate and such payment shall be a charge against the principal of such common trust fund.

14. Except as otherwise herein provided, such proceeding shall be conducted in the same manner as

any other proceeding for the voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee. Subject to the limitations set forth in subdivision nine hereof the decree in such proceeding unless reversed or modified on appeal shall be thereafter binding and conclusive in respect of any matter set forth in the account settled by such decree in all courts upon all parties having or who may thereafter have any interest in such common trust fund or in any estate, trust or fund held by such trust company either alone or in conjunction with another or others.

15. In any action or proceeding for the judicial settlement of the account of proceedings of any such trust company or any such trust company and one or more other persons acting in conjunction with it in any fiduciary capacity in respect of any estate, trust or fund the whole or any part of which shall have been invested in such a common trust fund, it shall be sufficient to set forth in such account the amount of such estate, trust or fund invested in such common trust fund and the amounts thereafter received for such estate, trust or fund from such common trust fund and the interest, if any, retained in such common trust fund together with a reference to all accounts with respect to such common trust fund so filed and judicially settled as hereinbefore provided covering the period of all such investments. A judgment or decree judicially settling the account of proceedings of a trust company in any fiduciary capacity when acting either alone or with one or more others with respect of any estate, trust or fund the whole or any part of which shall have been invested in a common trust fund shall not preclude any party

interested therein, upon the next judicial settlement of the account of the proceedings of said trust company with respect to such common trust fund, from questioning and objecting to any action or proceeding taken or omitted by such trust company with respect to such common trust fund after the last date covered by the last previously judicially settled account of such trust company with respect to such common trust fund and up to and including the time when the share or interest of such estate, trust or fund in such common trust fund shall have been wholly withdrawn therefrom.

(Book 4, McKinney's Consol. L. of N. Y., pp. 136-144, 1949 Cum. Annual Pocket Part, pp. 35-39.)

APPENDIX B.

The statutes of the State of New York listed below, relating to constructive service, require the mailing of the summons or citation where the name and address of the person interested is known or can be ascertained by reasonable diligence.

1. As to *in rem* proceedings: Civil Practice Act, Sec. 232, Sec. 232-a, Sec. 232-b, as amended (Book 3A, Gilbert-Bliss, 1949 Cum. Supp., pp. 26-28); Sec. 1421, subd. 3, as amended (Book 6B, Gilbert-Bliss, 1949 Cum. Supp., p. 33); Rules of Civil Practice, Rule 50 (Book 10, Gilbert-Bliss, p. 81, as amended 1949 Cum. Supp., pp. 9-10).

2. As to accountings for *inter vivos* trusts: Civil Practice Act, Sec. 1309 (Book 6B, Gilbert-Bliss, 1949 Cum. Supp., p. 14).

3. As to non-resident natural persons doing business in the State: Civil Practice Act, Sec. 229-b (Book 3A, Gilbert-Bliss, pp. 155-156).

4. When substituted service is used: Civil Practice Act, Sec. 231 (Book 3A, Gilbert-Bliss, p. 159, as amended 1949 Cum. Supp., p. 25).

5. As to foreign corporations doing business within the State: General Corporation Law, Sec. 217, as amended (Book 22, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 108).

6. As to domestic corporations: Stock Corporation Law, Sec. 25, as amended (Book 58, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 44).

7. As to foreign banks doing business within the State: Banking Law, Sec. 34 (Book 4, McKinney's Consol. Laws, p. 52).

8. As to insurers: Insurance Law, Sec. 59, Sec. 59-a (Book 27, Part I, McKinney's Consol. Laws, pp. 108-119).

9. On members of an insurer for levying of assessments: Insurance Law, Sec. 541 (Book 27, Part II, McKinney's Consol. Laws, pp. 496-497).

10. As to non-resident motorists: Vehicle and Traffic Law, Sec. 52 (Book 62-A, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, pp. 41-43).

11. On resident motorists leaving the State: Vehicle and Traffic Law, Sec. 52-a (Book 62-A, McKinney's Consol. Laws, 1949 Cum. Ann. Pocket Part, p. 45).

12. In tax foreclosure actions: Village Law, Sec. 126-d, subd. 15 (Book 63, McKinney's Consol. Laws, p. 165).

13. On an attorney-at-law in disbarment proceedings: Judiciary Law, Sec. 90, subd. 6 (Book 29, McKinney's Consol. Laws, pp. 108-109).

14. On creditors in proceedings relating to assignments for benefit of creditors: Debtor and Credit Law, Sec. 12 (Book 12, McKinney's Consol. Laws, pp. 43-44).

15. On teachers in dismissal proceedings: Education Law, Sec. 3012, subd. 3 (Book 16, Part I, McKinney's Consol. Law, pp. 704-705).

16. In proceedings to foreclose a mortgage on real estate by advertisement: Real Property Law, Secs. 540-542 (Book 49, Part II, McKinney's Consol. Laws, pp. 535-540).

17. In proceedings relating to decedents' estates: Surrogate's Court Act, Sec. 55 (Book 13, Gilbert-Bliss, pp. 83-84 as amended 1949 Cum. Supp., p. 36); Sec. 58 (Book 13, Gilbert-Bliss, p. 87); Sec. 59 (Book 13, Gilbert-Bliss, as amended 1949 Cum. Supp., pp. 37-38).

18. On holders of guaranteed mortgage certificates in reorganization proceedings under the Schackno Act: Unconsolidated Law, Sec. 4876, subd. 2 (Book 65, Part I, McKinney's Consol. Laws, pp. 374-377).

19. On holders of guaranteed mortgage certificates in similar proceedings under the Mortgage Commis-

sion Act: Unconsolidated Law, Sec. 4807 (Book 65, Part I, McKinney's Consol. Law, pp. 322-325), even though the Schackno Act and Mortgage Commission Act proceedings are based upon the police power of the State (*Matter of Mortgage Commission, 1175 Evergreen Ave.*, 270 N. Y. 436, cert. den. *sub nom. Lauro* v. *Barker*, 299 U. S. 521).

20. As to accountings for testamentary trusts: Surrogate's Court Act, Secs. 55, 58, 59 (*supra*).

APPENDIX C.

Common Trust Fund Legislation in Other States.

The District of Columbia and thirty States of the Union, other than New York, have enacted common trust fund legislation. Of these, there are eleven which have adopted the Uniform Common Trust Fund Act. Such States are:

Arizona (Laws 1941, C 35);
Colorado (Laws 1947, H. B. 308, secs. 1-8);
District of Columbia (Laws 1949, Public Law 416);
Florida (Statutes 1941, sec. 655.29 et seq.);
Idaho (Laws 1949, ch. 34, secs. 1-6);
North Carolina (Laws 1943, secs. 36-47-36-52);
South Dakota (Laws 1941, C.20);
Texas (Laws 1947, H. B. 702, secs. 1-7);
Washington (Laws 1943, C.55);
West Virginia (Code 1943, C.44, Art. 6, secs. 6, 7 and 8 as added by Laws 1945, S. B. No. 43);
Wisconsin (Statutes 1945, Sec. 223.055).

The other twenty States which have enacted common trust fund statutes are:

Alabama (Laws 1943, Gov. No. 565, sec. 15);
Arkansas (Laws 1947, Act No. 394, sec. 6);
California (G. Laws Act 652, sec. 108, as added by Laws 1947 c.338, sec. 1);
Connecticut (Laws 1947, Pub. Act 538, c.9, sec. 29, c.22, sec. 5; Pub. Act 223; Pub. Act 265, secs. 1, 2);
Delaware (Laws 1941, c. 224; Laws 1943, S. B. 34; Laws 1947, H. B. 267);
Georgia (Laws 1943, Gov. No. 413 as amended by Laws 1947, Act. No. 96);
Illinois (Revised Stats. c. 16½, secs. 57-63);
Indiana (Laws 1945, c. 124, sec. 1.h);
Kentucky (Revised Stat. 1946, secs. 287, 230);
Louisiana (Stats. 1939 as amended, secs. 9850.64);
Massachusetts (G. Laws 1946, supp. c. 203A, sec. 5);
Maryland (Md. Code 1939, as amended, Art. II, sec. 62A);
Michigan (Laws 1941, Act No. 174, sec. 13);
Minnesota (Stats. 1945, sec. 48.84 as amended by Laws 1947, c. 234);
New Jersey (Stats. Annot. Title 3:16-8:18);
Ohio (Laws 1943, H. B. No. 60);
Oklahoma (Laws 1949, S. B. 136, sec. 2; Okla. Statutes 1949 Supp., Title 60, sec. 162);
Pennsylvania (Purdons Stats. 1939, tit. 7, secs. 819-1109, 819-1109b);
Vermont (Pub. Laws 1933, as amended, sec. 6816);
Virginia (Laws 1944, c.369).

(The common trust fund legislation of all the states is set forth in C. C. H. Trust and Estate Reports, Vols. I, II.)

The provision of the Uniform Common Trust Fund Act, relating to accountings is section 2, which reads:

> "Court Accountings. Unless ordered by a court of competent jurisdiction, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the ( ) Court, secure approval of such an accounting on such conditions as the court may establish."

Of the eleven jurisdictions, which have adopted the Uniform Common Trust Fund Act, all but two, namely Idaho and South Dakota, have enacted section 2 thereof in the form set out above. In addition, four states, to wit, Arkansas, Michigan, Ohio and Virginia, have provisions substantially similar to said section 2.

Of the remaining eighteen States, thirteen, to wit: California, Connecticut, Delaware, Idaho, Indiana, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Oklahoma, Pennsylvania and Vermont have no provisions authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration of the common fund.

The remaining five States, Alabama, Georgia, South Dakota, Massachusetts and New Jersey, require the account of the common trust fund to be settled in the same manner and for the same purposes as is provided by law for other fiduciaries.

The provision of the Alabama statute (*supra*) as to common trust fund accountings reads as follows:

> "Unless ordered by a court of competent jurisdiction, a trust institution administering a common trust fund shall not be required to render a court accounting with regard to such fund, but it may file returns and make accountings in the same manner and for the same purposes as is provided by law for other fiduciaries."

The requirement of the Georgia act (*supra*) as to such accountings runs:

> "Unless ordered by a court of competent jurisdiction, a trust institution administering a common trust fund shall not be required to render a court accounting with regard to such fund, but it may file returns and make accounting in the same manner and for the same purposes as is provided by law, for other fiduciaries."

The provision of the Massachusetts statute (*supra*) is:

> "Sec. 5. Annual Account of Administration of Common Trust Fund.
>
> An account of the administration of each common trust fund shall be filed annually in the registry of probate in which the declaration of trust has been filed and application for its allowance shall be made in accordance with section twenty-four of chapter two hundred and six. The allowance of such an account shall be conclusive as to all matters shown therein upon all persons then or thereafter interested in the funds invested in said common trust fund."

Sec. 24 of Chapter 206 of General Laws of Massachusetts reads in part as follows:

> "Upon application for the allowance of an account filed in the probate court such notice as the court may order shall be given to all persons interested."

The New Jersey act (*supra*) provides:

> "Accounting by bank maintaining common trust fund.
>
> "Unless ordered by a court of competent jurisdiction, a bank maintaining a common trust fund shall not be required to render a court accounting with regard to such fund, but it may make accountings in the same manner and for the same purposes as is provided by law for other fiduciaries."

The South Dakota Act (*supra*) reads:

> "The bank or trust company operating such common trust funds shall comply with the provisions of Chapter 33.26 of the South Dakota Code of 1939 in the administration of the trust estate."

1939 Code of South Dakota (Vol. 2, p. 284):

> "33.2610 Notice of hearing: general provision; form; method of service; additional notice in discretion of Court. Notice of all hearings including hearings on all reports of the trustee and on all petitions filed shall be given as provided in this chapter. The form of such notice must be prescribed by the Court and must show

the time and place of hearing and the nature of such hearing. When the hearing is on any account of the trustee a copy of the account must be served with the notice. The notice must be served at least ten days prior to the hearing unless the Court for good cause shown directs a shorter period.

"Such notice shall be served upon all trustees and upon all beneficiaries either personally or by registered mail addressed to each at his last known post office address as shown by the records and files in the proceedings."